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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-

SALVATORE ORLANDO,

Petitioner,

—v.—

MELVIN LAIRD, individually and as Secretary of Defense of the United States: and STANLEY R. RESOR, individually and as Secretary of the Army of the United States,

Respondents.

DOUGLAS KAPLAN,

Petitioner,

—v.—

MELVIN LAIRD, individually, and as Secretary of Defense of the United States, STANLEY R. RESOR, individually, and as Secretary of the Army of the United States, and MAJOR GENERAL WALTER M. HIGGINS, Commanding General, Fort Hamilton, Brooklyn, New York, Commanding Officer, Overseas Replacement Station, Fort Dix, New Jersey,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Salvatore Orlando prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on April 20, 1971.* Petitioner Douglas Kaplan prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on July 14, 1971.

Citation to Opinion Below

The opinion of the United States Court of Appeals in the *Orlando* case is unreported and printed in the Appendix, *infra,* pp. 23a-30a. The opinion of the United States District Court, Eastern District of New York in the *Orlando* case is reported at 317 F. Supp. 1013 (E.D.N.Y. 1970), and is printed in the Appendix, *infra,* pp. 8a-21a. The opinions of the Second Circuit and the Eastern District of New York in the *Kaplan* case are unreported and are printed in the Appendix, *infra,* pp. 31a-33a.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit in *Orlando* was entered on April 20, 1971. The judgment in the *Kaplan* case was entered on

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* The *Orlando* case was consolidated for appeal with a second action involving identical legal issues brought by Malcolm A. Berk who also challenged the legality of his Vietnam orders. See *Berk* v. *Laird,* 317 F. Supp. 715 (E.D.N.Y. 1970). On March 20, 1971 Berk was discharged from the Army for hardship reasons, apparently mooting his action herein. However since the *Berk* and *Orlando* cases were heard together by the Second Circuit and since the *Kaplan* case was decided by the District Court on the basis of the *Berk* case, the facts relating to Berk are included in this petition in order to give the Court the full background of these related cases.

July 14, 1971. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

Constitutional and Statutory Provisions Involved

U. S. Constitution, Article I, Section 8, Article II, Section 1, Article II, Section 2

Gulf of Tonkin Resolution ("Joint Resolution to promote the maintenance of international peace and security in Southeast Asia," P.L. 88-408, 78 Stat. 384, August 10, 1964)

Foreign Military Sales Act (P.L. 91-672, 84 Stat. 2053, January 12, 1971) Section 12

Defense Supplemental Appropriations Act, 1965 (P.L. 89-18, 79 Stat. 109, May 7, 1965)

Supplemental Defense Authorization Act, 1966 (P.L. 89-367, 80 Stat. 36, March 16, 1966), Sec. 401. (a)

Armed Forces Supplemental Authorization Act, 1967 (P.L. 90-5, 81 Stat. 5, March 16, 1967), Sec. 401.

(See Appendix B for text of above provisions.)

Questions Presented

1. Whether the Constitution, in specifically granting Congress the power to declare war, permits the Executive to initiate and prosecute large-scale foreign military hostilities without the express authorization of Congress, thereby making the orders to petitioners constitutional?

2. Whether the Gulf of Tonkin Resolution despite its subsequent repeal, military appropriations acts, or any other act of Congress constitute sufficient authorization of the Vietnam War to comply with the Constitution, thereby making the orders to petitioners constitutional?

Statement of the Case

This case presents a challenge on the merits to the constitutionality of the Executive's waging of the Vietnam War. Brought by soldiers with orders to proceed to Vietnam, the case established in prior proceedings (described below) that the basic legal issues of the war are justiciable, that a soldier with military orders to go to Vietnam can challenge those orders in a federal action and that the Executive cannot wage the war on its own authority. The case is now ripe for adjudication as to whether Congress authorized the war in accordance with constitutional mandates.

Orlando

Petitioner Orlando first enlisted in the United States Army on November 11, 1965 and re-enlisted on May 8, 1968. After receiving orders for Vietnam, Orlando sought to prevent his shipment to Vietnam by initiating the instant action on June 11, 1970. Jurisdiction was based on 28 U.S.C. §§1331, 1332(a), 1361 and 1391.

Orlando moved for injunctive relief on June 12, 1970. After the decision by the Second Circuit Court of Appeals in the companion case of *Berk* v. *Laird*, 429 F.2d 302 (2nd Cir. June 19, 1970) (Appendix pp. 1a-7a)[1] the District

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[1] Berk had initiated his action to block his Vietnam orders on June 3, 1970 and at the same time moved the District Court for a preliminary injunction. On June 5, 1970, the motion was denied and on appeal to the Second Circuit, the district court's action was upheld. *Berk* v. *Laird*, 429 F.2d 302 (June 19, 1970). However, the Second Circuit held that the basic legal issues of the Vietnam war were cognizable by a federal court:

> ". . . Since orders to fight must be issued in accordance with proper authorization from both branches under some circum-

Court (Dooling, D.J.) denied petitioner's request for injunctive relief on the ground that his orders were constitutionally authorized. 317 F. Supp. 1013 (July 1, 1970). An appeal was taken from Judge Dooling's decision and was consolidated with the *Berk* case for consideration by the Second Circuit.[2]

Second Circuit Decision Sought to be Reviewed

Judge Dooling's decision in *Orlando* and Judge Judd's decision in *Berk*[3] were consolidated for appeal in the Second

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stances, executive officers are under a threshold constitutional 'duty [which] can be judicially identified and its breach judicially determined.' *Baker* v. *Carr, supra,* 369 U.S. at 198, 82 S. Ct. at 700. . . .

If the executive branch engaged the nation in prolonged foreign military activities without any significant congressional authorization, a court might be able to determine that this extreme step violated a discoverable standard calling for *some* mutual participation by Congress in accordance with Article I, section 8," 429 F.2d at 305. Appendix pp. 4a-5a.

[2] Ordinarily, an appeal from the denial of preliminary injunctive relief poses a relatively narrow scope for review. However, where the district court has, in effect, finally determined the legal issues governing the disposition of the entire case, an appellate court should review the district court's decision as to those controlling legal issues. See e.g., *F.T.C.* v. *Cinderella Career and Finishing Schools, Inc.*, 404 F.2d 1308, 1310-11 (D.C. Cir. 1968); *A. L. Mechling Barge Line* v. *Bassett*, 119 F.2d 995 (7th Cir. 1941). Petitioner presented his entire case to Judge Dooling on the motion for preliminary injunctive relief. The view of the law contained in Judge Dooling's opinion renders it impossible for petitioner to prevail in any subsequent proceeding in the District Court. Accordingly, this case is ripe for plenary appellate review and was so considered by the Second Circuit.

[3] In its initial decision in *Berk*, the Second Circuit directed that a hearing on a permanent injunction be held in the district court at which time Berk would have an opportunity to show that "discoverable and manageable standards" exist by which the legal and constitutional issues of the war might be resolved. On remand, the government moved for summary judgment on the ground that

Circuit. The Court of Appeals issued its decision affirming the two district courts on April 20, 1971. It reaffirmed its holding that the constitutional issues of the war were justiciable.

> "We held in the first *Berk* opinion that the constitutional delegation of the war-declaring power to the Congress contains a discoverable and manageable standard imposing on the Congress a duty of mutual participation in the prosecution of war. Judicial scrutiny of that duty, therefore, is not foreclosed by the political question doctrine." Appendix, p. 26a.

But the Court held on the merits that Congressional action such as the Gulf of Tonkin Resolution, military appropriations acts and extension of the draft showed Congressional participation in, and therefore authorization of, the prosecution of the war.

> "There is, therefore, no lack of clear evidence to support a conclusion that there was an abundance of continuing mutual participation in the prosecution of the war. Both branches collaborated in the endeavor, and neither could long maintain such a war without the concurrence and cooperation of the other." Appendix p. 28a.

Kaplan

Petitioner Kaplan enlisted in the Army on July 18, 1969 for a three year tour of duty. He was sent to Vietnam on

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Congress had in fact authorized the Executive to wage the war in Vietnam through the Gulf of Tonkin resolution and later military spending bills. On September 16, 1970, the district court granted the government's motion for summary judgment on the ground that "Congress had authorized the President to send members of the armed forces to South Vietnam to engage in hostilities." 317 F. Supp. at 716.

July 1, 1970. On November 11, 1970, he returned to the United States on emergency leave. While on leave, on May 25, 1971, he commenced this action challenging the constitutionality of his military orders consigning him to Vietnam.[4] The District Court (Judd, D.J.) dismissed the action on July 7, 1971 relying on its previous decision in *Berk* v. *Laird*, 317 F. Supp. 715, and on the Second Circuit's decision in *Orlando* and *Berk*. That decision was affirmed by the Second Circuit on July 14, 1971.

Reason for Granting the Writ

Preliminary Statement

There is little doubt that the Vietnam War is the most disturbing and troublesome issue of our times. It has divided and agitated American society not only because a great many citizens now question the wisdom of our efforts in Southeast Asia, but because the legality and constitutionality of American military involvement in Vietnam is in serious question. Millions of Americans feel that we have become embroiled in Vietnam through procedures which have failed to satisfy constitutional norms. Thus they view the struggle in Vietnam not as the lawful expression of the nation's will but as an unlawful exercise in naked power. As Senator Sam Ervin has said:

"The consequences of this failure to observe the Constitution are all too evident. True, no Supreme Court

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[4] Since Kaplan served only four months and ten days in Vietnam before he returned on leave, he must serve an additional seven months and twenty days in that theater. See Department of Defense Directive No. 1315.7 ("Overseas Duty Tours of Military Personnel," Enclosure No. 1, p. 6, 10/20/70). His return to Vietnam has been stayed in a related action not involving the constitutional questions presented here.

decision has adjudged the war in Vietnam as unconstitutional on the grounds that Congress adopted no formal declaration of war and because the Senate gave no effective advice and consent. Instead, the declaration of unconstitutionality has come from the judgment of the people. We see the decree everywhere. For the first time in our memory, an incumbent President was forced from office.

Young men whose fathers and brothers volunteered to serve their country now desert to Canada and Scandanavia rather than bear arms in the country's cause. Thousands march on Washington and picket the White House, the Capitol, and the Pentagon. Now we have riots and violence on our university campuses. ROTC programs are being forced out of schools, and there is dissension and antiwar activity even among those in uniform.

Perhaps not all the anarchy we see today has been caused by the Vietnamese war and the way in which we became involved. No one can say. But no one can say that the war was not the cause, or at least the catalyst. And I cannot shake the feeling that ultimately the reason so many are now disrespectful and unresponsive to authority is because authority was disrespectful and unresponsive to the Constitution in the making of our policy in Vietnam." 115 *Cong. Rec.* 17217 (June 25, 1969).

Reflecting Senator Ervin's perception that much of the divisiveness flowing from the war in Vietnam stems from the war's questionable legal basis, virtually every political figure in the nation has offered an opinion on the war's

legality. Charges of "Executive usurpation," "Congressional pusillanimity," "Constitutional crisis" fly back and forth in the Congress and on the editorial pages throughout the nation. Many state legislatures have passed or are considering special laws to protect their citizens from service in Vietnam with a view to obtaining a court test of the war. (See *The New York Times,* May 2, 1971, p. 40.) Until the Second Circuit spoke in the *Berk* and *Orlando* cases, there was silence from the one organ of government vested with responsibility to speak authoritatively on the proper allocation of constitutional responsibility between the Executive and the Congress—the Federal judiciary.

The silence of the courts on this issue meant that soldiers —like the two petitioners herein—who had been ordered to go to Vietnam to risk their lives in what they claimed was an illegal war had no forum to hear their complaints. For the federal courts to avoid their responsibility of hearing the constitutional complaints of the citizens most directly affected by the Executive's actions is to deny the very purpose for which they were instituted.[5]

The silence of the courts on the issue of the Executive's authority to wage war in Vietnam has not led to any resolution, or to any hope of resolution, of the problem by the other branches of government. The Executive continues to flirt with the concept of inherent authority to wage war.

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[5] James Madison stated when he introduced the Bill of Rights into Congress: "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights [in the Bill of Rights]; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment of rights expressly stipulated for in the Constitution by the declaration of rights." 1 *Annals of Congress,* 1st Cong., 1st Sess. 439.

The Congress cannot fashion a legislative response because of widespread disagreement as to the meaning of Article I, Section 8 and its impact upon Executive power. Thus, the nation may be doomed to repeat its Vietnam agony until a definitive rule is established by the body who alone can say the last word: this Court.

I.

The conflicts among the lower courts and among the coordinate branches of government as to the jurisdiction of the federal courts to review the Executive's war powers and the constitutional standards to be applied require a definitive resolution of the issues involved.

The current state of the law relating to the meaning of Article I, Section 8, clause 11 of the Constitution and the ability of the courts to review the constitutional reach of the Executive's war power is in conflict and remains totally unsatisfactory.

First, a basic disagreement has arisen between the Circuits as to the justiciability of a contention that no Congressional authorization exists for the waging of the Vietnam war.

The Second Circuit, and both District Court judges below, rejected the government's contention that challenges to the legal sufficiency of the Executive's waging of war in Vietnam posed non-justiciable issues.[6] The Second Cir-

[6] Judge Dooling held that the issues are justiciable:

"... determining whether or not a political decision has been taken by the appropriate set of governmental acts inescapably presents a purely judicial question when the existence or non-existence of a valid political authorization as the source of a

cuit's view of jurisdiction has been adopted by a District Court in the Northern District of California. *Mottola* v. *Nixon*, 318 F. Supp. 538 (N.D. Cal. 1970).

The District of Columbia Circuit has reached a diametrically opposed jurisdictional position in *Luftig* v. *McNamara*, 373 F.2d 664, 665-666 (D.C. Cir. 1967), *cert. den.* 387 U.S. 945 (1967). The District of Columbia Circuit's jurisdictional position has been accepted by District Courts in Massachusetts and Virginia, *Massachusetts* v. *Laird*, No. 71-419-W (D. Mass. June 1, 1971); *Davi* v. *Laird*, 318 F. Supp. 478 (W.D. Va. 1970).

Among those courts reaching the merits of the challenges to the war in Vietnam, equally contradictory results have

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particular command is drawn in question by one directly affected by it in his individual liberty as a citizen. . . . [If a court decides against the government], the only consequence can be resumption of conformity to constitutional norms of political conduct to achieve, dilute, deflect or reverse the desired political objectives." 317 F. Supp. at 1016. Appendix, pp. 12a-13a.

This view has been recently confirmed by three members of this Court in *New York Times Co.* v. *United States*, 39 LW 4879 (June 30, 1971). Justice Harlan said in dissent (Chief Justice Burger and Justice Blackmun concurring):

"I agree that, in performance of its duty to protect the values of the First Amendment against political pressures, the judiciary must review the initial Executive determination to the point of satisfying itself that the subject matter of the dispute does lie within the proper compass of the President's foreign relations power. Constitutional considerations forbid 'a complete abandonment of judicial control.' Cf. United States v. Reynolds, 345 U.S. 1, 8 (1953)" 39 LW at 4892.

Certainly the judiciary must examine the direct use of the war power by the Executive to satisfy itself that "the subject matter of the dispute lies within the proper compass of the President's foreign relations power." In this vital area there cannot be a "complete abandonment of judicial control."

occurred. Judge Dooling found that the Gulf of Tonkin Resolution lacked compelling significance as authority to wage war in Vietnam. 317 F. Supp. at 1019. Judge Judd disagreed. 317 F. Supp. at 723. The Second Circuit cited the Tonkin Gulf Resolution as authority for the war, but ignored the fact of its repeal in January 1971. Finally, the District Court in *Mottola* stated that the Tonkin Gulf Resolution "falls far short of a declaration of war, or even of implied authorization for the kind of all out full scale war subsequently launched by the President in Vietnam." 318 F. Supp. at 544.

Moreover, recent disclosures of the highly questionable circumstances which surrounded the adoption of the Tonkin Gulf Resolution in 1964 further cloud its legal effect. See The New York Times, *The Pentagon Papers* 234ff. (Bantam ed. 1971).

The Second Circuit below relied primarily on the appropriation of funds for the Vietnam war and the extension of the draft as constitutionally sufficient manifestations of Congressional assent to the war. See Appendix pp. 27a-28a. However, this ground was explicitly rejected by the *Mottola* court. 318 F. Supp. at 543.

More important, that ground of the Second Circuit's decision was severely criticized on the floor of the Senate by the Chairmen of both the Foreign Relations Committee and the Armed Services Committee, who expressed consternation at the court's opinion. 117 *Cong. Rec.* S8320-23 (daily ed. June 4, 1971). See Appendix C, pp. 39a-50a for Congressional comments on the decisions below.

This exchange on the floor of Congress reflects the great division that exists between the coordinate branches of

government on the reach and meaning of the war power clauses of the Constitution. The Executive has consistently maintained that it possesses "inherent authority" to prosecute large scale military operations in the absence of Congressional authorization by virtue of its control of the nation's foreign policy and its role as Commander-in-Chief of its armed forces. See generally, Brief of the Solicitor General in *Massachusetts* v. *Laird*, No. 42 Orig., October Term, 1970, pp. 18-24; televised interview of President Richard M. Nixon on July 1, 1970 reported at 117 *Cong. Rec.* S8761 (daily ed. June 10, 1971). See also 116 *Cong. Rec.* S9598, 9591 (daily ed. June 23, 1970); 116 *Cong. Rec.* S21850 (daily ed. January 2, 1971).[7]

Members of Congress have categorically rejected the existence of inherent Executive authority to wage war and have severely criticized the Second Circuit's ruling that Congressional approval of the Vietnam war may be implied from the passage of appropriations bills and the extension of the draft. An amendment was introduced into the Senate to negative the Second Circuit's opinion in *Orlando* but it was then withdrawn as unnecessary. See 117 *Cong. Rec.* S9685-89 (daily ed. June 22, 1971). Appendix pp. 46a-50a. See in addition to the debates noted above, remarks of Senator Alan Cranston, 116 *Cong. Rec.* S11818 (daily ed. July 21,

[7] All the courts that have examined the matter have firmly rejected the idea that the President could wage a war of Vietnam dimensions without the authorization of Congress. The Second Circuit noted: "If the executive branch engaged the nation in prolonged foreign military activities without any significant congressional authorization, a court might be able to determine that this extreme step violated a discoverable standard calling for some mutual participation by Congress in accordance with Article I, section 8." *Berk* v. *Laird*, 429 F.2d at 305. See also Judge Dooling's opinion in *Orlando*, 317 F. Supp. at 1016; Judge Sweigert's opinion in *Mottola*, 318 F. Supp. at 541.

1970); Appendix p. 39a. Senator George S. McGovern, 116 *Cong. Rec.* S11987 (daily ed. July 23, 1970); Appendix p. 40a. Senators Mark Hatfield and J. William Fulbright, 117 *Cong. Rec.* S8044 (daily ed. June 2, 1971). Appendix p. 41a. See also statement of Senator Richard Russell, 112 *Cong. Rec.* 3135 (February 16, 1966), reproduced in the Appendix at p. 51a.

The Executive itself has taken inconsistent positions on the legal basis of the Vietnam War. The State Department represented to Congress that the Gulf of Tonkin resolution was unnecessary for the prosecution of the war. See Letter from H. G. Torbert, Jr., Acting Assistant Secretary of State for Congressional Relations to Senator J. William Fulbright. Quoted in Senate Report No. 91-872, 91st Cong., 2d Sess. 20, 23 (1970).

Despite these disclaimers, the government has urged *in every single case in which the issue has arisen* that the Gulf of Tonkin Resolution was a constitutional basis for the war—even after its repeal.

The inevitable result of the inconsistent positions concerning the constitutional basis for the war is to perpetuate the national confusion over its legality and to intensify the bitterness of the national debate over its continuation. Indeed, the only point that has clearly emerged from the welter of conflicting opinions over the legal basis for the war is that unless and until this Court clarifies the constitutional allocation of powers between the Congress and the Executive in the area of war and peace, confusion and uncertainty must plague any future consideration of the war in Vietnam by the political branches of government.

II.

The decisions below raise vital questions on the scope of the Executive's war powers; the courts' resolution of those questions was incorrect.

One of the most important constitutional questions that can face this nation is how we go to war. It would appear that the Constitution settled this matter as definitively as possible in Article I, Section 8, Clause 11 which states that "The Congress shall have Power . . . To declare War . . ."[8] Yet the court below held that Congress need not do the actual decision-making in the field of war or peace. All that is necessary is that there exist "some mutual participation between the Congress and the President" in the prosecution of the war for the constitutional provisions to be satified. Appendix, p. 30a.

The court's ruling is nothing less than revolutionary. For it amounts to a complete shifting of a vital constitutional power from one branch of the government to another. And without defining the scope of the "mutual participation" that would be required by Congress, the court's

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[8] See opinion of Justice Douglas (Justice Black concurring) in *New York Times Co.* v. *United States, supra*, 39 LW at 4882:

> "The power to wage war is 'the power to wage war successfully.' See *Hirabayashi* v. *United States*, 320 U.S. 81, 93. But the war power stems from a declaration of war. The Constitution by Article I, §8, gives Congress, not the President, power 'to declare war.' Nowhere are presidential wars authorized."

See also opinion of Justice Stewart (Justice White concurring) at 39 LW 4883:

> "Article I, §8 empowers Congress to 'raise and support Armies,' and 'provide and maintain a Navy.' And, of course, Congress alone can declare war. This power was last exercised almost 30 years ago at the inception of World War II."

ruling adds even more confusion to an area where strict lines of constitutional authority are crucial to the security and peace of the nation.

Essentially, the ruling below was that Congress may exercise its war power from collateral acts supportive of the war, such as the passing of military spending bills or by extending the draft. Thus, the central question raised by this appeal is whether Congress may be deemed to have exercised its responsibilities under Article I, Section 8, clause 11 of the Constitution by implication from the passage of such collateral acts, or whether Congressional will in the area of war and peace must be manifested by an explicit, formal, Congressional act. The issue of whether the Constitution permits this nation to drift deeper and deeper into a bloody war without some formal, explicit, manifestation of Congressional approval is among the most critical ever presented to this Court.

A. *The Doctrine of "Implied Exercise" of the Congressional War Power Would Dilute, and Perhaps Destroy, the Responsibility of Congress to be the Ultimate Arbiter of War and Peace*

The text of Article I, Section 8, clause 11 leaves no room for doubt that it was intended to shield the nation from the threat of improvident military operations initiated by the Executive. The debates surrounding the drafting of the war power clause reinforce the notion that its primary purpose was to disable the Executive from entangling the nation in war without the express, formal approval of Congress. E.g. Farrand, *Records of the Federal Convention,* Vol. II, 318-319 (1911) (remarks of Elbridge Gerry); Morris (ed.), *Alexander Hamilton and the Founding of a Nation,* 256 (1957).

The language of the Constitution as originally set forth by the framers does not come before this Court as a matter of first impression. Nearly two hundred years of our history have given life and definite scope to the language of the Constitution. The Executive has the power to initiate certain limited forms of military activities, along with the more general power to repel direct attacks on the United States. Included in the limited emergency instances are numerous cases where the President temporarily used military force to protect American citizens or property located in foreign countries, or to commit reprisals against politically unorganized bandits or pirates.

The power of Congress to declare war has also been given more certain meaning by the course of events. The power, as it has evolved, has not been restricted to an inflexible and mechanistic requirement that the talismanic words "We declare war" be uttered. As it has become understood and applied, the declaration power is an instrument to be used by Congress to give precise authorization to the President and to set guidelines as to the purpose and scope of military hostilities to be conducted by the President.[9]

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[9] In addition to declaring war five times and granting the President broad powers to fight the Civil War, Congress has *specifically authorized* the Executive to use the armed forces on numerous occasions, which fell far below the levels reached in Vietnam. The naval war with France, waged from 1798-1801, was authorized by explicit Congressional resolution. 1 Stat. 561; 1 Stat. 572, extended 2 Stat. 39 (April 22, 1800); 1 Stat. 574; 1 Stat. 578; 1 Stat. 743; see discussion in *Bas* v. *Tingey*, 4 Dall. 37 (1800); *Talbot* v. *Seeman*, 1 *Cranch* 1 (1801). The naval war against Tripoli (1802) was authorized by explicit Congressional resolution. 2 Stat. 129. The naval war against Algiers (1815) was authorized by explicit Congressional resolution. 3 Stat. 230 (March 3, 1815). See also 5 Stat. 355, 11 Stat. 370, 26 Stat. 675, 38 Stat. 770, 69 Stat. 7 for other examples.

The court below ignored the constitutional text, the constitutional debates and the historic development described above which made clear that explicit Congressional action was constitutionally required to authorize war. Instead it relied on what it claimed was "some mutual participation" by Congress in the prosecution of the war. Such implied authority without a formal and explicit act by Congress is a violation of the entire constitutional scheme. As Justice Marshall recently stated in the *New York Times* case:

> "The Constitution provides that Congress shall make laws, the President execute laws, and courts interpret law. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952). It did not provide for government by injunction in which the courts and the Executive can 'make law' without regard to the action of Congress." 39 LW at 4888.

Nor does the Constitution provide for government by implication in which the Executive can "make law" (i.e. a declaration of war) without regard to any action of Congress.

B. *The Doctrine of "Implied Exercise" of the War Power is Contrary to Previous Decisions of this Court*

This Court has made clear that, as a matter of law, Congressional appropriations, standing alone, cannot be asserted as a legal justification for Executive action beyond Constitutional limits. In *Greene* v. *McElroy,* 360 U.S. 474 (1959) the petitioner lost his job with a defense contractor as a result of the revocation of his security

clearance by the Department of Defense. The loyalty security procedures at issue had been created pursuant to a joint agreement between the three branches of the military with the cooperation of the Department of Defense. No underlying Congressional act existed which could, even arguably, form the basis for such procedures.

Chief Justice Warren, writing for the Court, rejected the Executive's contention that mere Congressional appropriations of money to fund the program at issue constituted sufficient legislative sanction for the program.

> "[The Executive argues that] Congress, although it has not enacted specific legislation relating to clearance procedures to be utilized for industrial workers, has acquiesced in the existing Department of Defense program and has ratified it *by specifically appropriating funds to finance one aspect of it.* . . . Such decisions cannot be assumed by acquiescence or nonaction. . . . They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, . . . but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. *Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.*" (Emphasis added.) 360 U.S. at 506-507.

When other issues of great constitutional importance have come before this Court, it has refused to accept the

appropriations-as-authorization argument. In *Ex parte Endo,* 323 U.S. 283 (1944), the question arose whether Congress had ratified the detention of admittedly loyal Japanese-American citizens by the War Relocation Authority. The Authority had established detention centers and kept Japanese-American citizens in them under strict procedures. The government argued that Congress was aware of the detention procedures and had therefore authorized them by appropriating money for the expenses of the War Relocation Authority. This Court rejected that argument.

C. *The Doctrine of "Implied Exercise" of the War Power Would Render the Language of Article I, Section 8, clause 11 Mere Surplusage*

If the act of voting military appropriations under the "purse power" of Article I, Section 8 automatically triggers the war power of clause 11 by implication, what is the purpose of an independent enumeration of the war power in the first instance? Since every military operation must, of necessity, be the subject of at least biennial Congressional appropriations, a rule which states that Congress impliedly exercises its war power whenever it votes for military appropriations effects a virtual emasculation of clause 11.

D. *The Doctrine of "Implied Exercise" of the War Power Would Jeopardize the Separation of Powers Between the Executive and the Legislature*

The framers of the Constitution intended that this nation would not go to war unless the Congress first decided that we should. If the President can take the nation into war without a Congressional authorization, and if the war

is legal merely if Congress appropriates money, then the President, not the Congress, will have the power to make the initial decision to go to war, and the Congress will be reduced to merely having a veto power to stop what the Executive has done. Since the Congress' role will be reduced to merely vetoing a war it does not like, the constitutional scheme by which the Congress has the lawmaking power and the President the veto power is reversed.

Moreover, once the President has placed troops in the field, Congress cannot, as a practical matter, deny the appropriations necessary to avert their slaughter. Is Congress to refuse them guns or bullets or replacements? To pay the bill for an Executive *fait accompli* does not provide the independent, unfettered, clear cut Congressional exercise of the war power which the Founding Fathers envisioned as a protection against improvident military adventures by the Executive.

Furthermore, under the theory adopted by the court below, the opponents of a given war would be saddled with the necessity of marshalling a majority in favor of restrictive amendments in order to stop the war. It is absolutely inconsistent with the plain meaning of Article I, Section 8 to impose upon Congress the onus of marshalling a majority in order to veto an Executive war rather than to require it to make the initial decisions in this area.

Indeed, to impose such a requirement on Congress makes it far easier for the President to initiate a large war rather than a small one. The greater the step taken by the President, the more troops he commits to combat, the stronger is the pressure on Congress to vote for their continued support. The legislature might be willing to cut off funds

for a small expeditionary force, knowing that the President can easily extricate them. But it would find it impossible to do so when hundreds of thousands of troops are committed to battle.

The problem is not merely one of the form of legislation, simply a "choice . . . between an explicit declaration on the one hand and a resolution and war-implementing legislation on the other," as the Second Circuit said in *Orlando* (Appendix p. 28a). Appropriations acts are different in quality, purpose, and effect from the type of explicit authorizing legislation required by the Constitution.

They are different in quality because an explicit legislative act permitting the Executive to wage war forces each Congressman to face up to his most awesome constitutional responsibility. By requiring Congress to vote on an act *explicitly authorizing war,* the Constitution forces each Congressman to confront the most serious step he can possibly take with respect to the lives and fortunes of his fellow citizens and to decide whether such a course of action is in the best interests of the nation.[10] The people are also brought to realize what is to be expected of them.

A military appropriations bill has none of these attributes. The purpose of a spending bill is always varied.* A

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[10] Such a step was never taken with respect to the Vietnam war. Congressman Donald Riegle recently said on the floor of Congress:

> "Everyone in this Chamber knows that we have not had one vote on the war in Vietnam in either the House or the Senate in the last 10 years, and I mean a direct 'yes' or 'no' vote on the war in Vietnam. We even hide the money for the war in Vietnam in the Defense appropriation so that we do not have to have a specific vote on the issue." 117 *Cong. Rec.* H3442 (daily edition, May 4, 1971).

* See remarks of Senator Stennis, Appendix p. 44a.

lump authorization or appropriation bill may provide for development of new weapons or an increase in soldiers pay or construction of needed ships or docks or planes. How can a Congressman decide that he does or does not want the nation to go to war when he votes on military spending. How can anyone say that the enactment of a general defense appropriation bill manifests an intent to authorize any military activity that the nation is then engaged in?

E. *The Doctrine of "Implied Exercise" of the War Power Renders it Virtually Impossible for the Electorate to Pass Judgment on the Performance of Their Representatives*

Article I, Section 8, clause 12 provides that no military appropriation may extend for more than two years. Since the entire House of Representatives and one-third of the Senate must stand for re-election every two years, the Founding Fathers obviously intended to create an ultimate electoral check upon any Congressional determination that a war was advisable. Thus, any rule of constitutional law which would permit Congress to exercise its war power by implication from collateral acts in a manner not capable of ready public understanding as to the respective position of individual legislators on the war itself would frustrate the constitutional scheme. The electorate would then be deprived of its opportunity to pass judgment upon each legislator's position on the war.

It is, of course, impossible to discern from the voting patterns of individual legislators on appropriations bills or draft extensions their individual positions on the Vietnam war. The most vociferous critics of the war, moved by extraneous considerations, have consistently voted to pay the bill. Permitting "implied exercise" of the war

power by Congress would be analogous to providing that a vote on the advisability of the war be taken in closed session, with the totals publicly announced, but individual votes kept secret. The result in both cases would be to rob the electorate of any meaningful ability to pass judgment on their respective representatives.

III.

None of the Congressional actions cited by the court below amounts to Congressional authorization of the Vietnam War.

A. *The Gulf of Tonkin Resolution*

The court below cited the Gulf of Tonkin Resolution as authority for the Vietnam War. The resolution, the court said, "was expressed in broad language which clearly showed the state of mind of the Congress and its intention fully to implement and support the military and naval actions taken by and planned to be taken by the President at that time in Southeast Asia. . . ." (Appendix, p. 26a). It is difficult to see how Congress could have authorized any military actions "planned to be taken by the President" since it was kept completely in the dark on the Executive's military preparations. See The New York Times, *The Pentagon Papers* (Bantam ed. 1971). In any event, the court's statements completely ignore the actual wording of the resolution,[11] the representations made to Congress by the Presi-

[11] The resolution merely approved the President's determination to repel armed attack on American forces and indicated that the United States was "prepared . . . to take all necessary steps" to meet Communist aggression. But it required that this be done "consonant with the Constitution," i.e. upon Congressional authorization pursuant to Article I, Section 8.

dent,[12] and the legislative history of the passage of the resolution.[13]

The proper construction of the Tonkin resolution is that, at the time, it was believed necessary to meet a crisis situation in the Gulf of Tonkin in August, 1964. Through the resolution, Congress approved the Executive's limited response to that specific situation. It did not authorize massive military activity in Southeast Asia. Whatever its original purpose, its repeal by Congress in January, 1971* —which was totally ignored by the court below—removes it as the legal justification for continued prosecution of the war. Repeal *makes clear that either the resolution never* had the significance claimed for it or, if it did, then that authorization is now withdrawn. Either way, the resolution can no longer be considered as meaningful in this action.

B. *Congressional appropriations act and other legislation*

To show Congressional authorization of the Vietnam War the court below primarily relied upon the numerous appropriations bills passed to support the war. It also cited the extension of the draft law and other ancillary Congressional action which recognized the state of war in Vietnam.

The operative language of the appropriations bills relating to the Vietnam War is laid out at pp. 37a-38a in the

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[12] President Johnson said: ". . . the United States intends no rashness and seeks no wider war." 110 *Cong. Rec.* 18132 (Aug. 5, 1964).

[13] See remarks of Senators Brewster and Fulbright, 110 *Cong. Rec.* 18403-404; Senator Nelson's comments at 18406-407; Representative Morgan's comments at 18539: "This is definitely not an advance declaration of war." Representative Adair's comments at 18543 and Representative Fascell's statement at 18549.

* See appendix p. 37a,

appendix. (Although twenty authorization and appropriation bills were passed, one of the three formulas appears in each of them.) It is clear that the language cannot be construed as an authorization of war.

The first formula (P.L. 89-18, appendix p. 37a) falls far short of any grant of authority to fight in Vietnam. Vietnam is not even mentioned. By discussing "military activities in Southeast Asia," does the bill authorize an American invasion of Indonesia, or Burma, or Singapore? Would it permit an atomic attack on southern China which certainly lies "in Southeast Asia"? Clearly, the language lacks the precision one would hope for in an authorization of war.

The second formula (P.L. 89-367, appendix p. 37a) is hardly better. On its face it simply permits military support of Vietnamese and other forces in Vietnam. But such support can be by shipment of weapons only. There is nothing in the language which explicitly authorized American forces themselves to be used. The vague formula found in this law is often used in foreign assistance laws where actual use of American troops is not contemplated. Thus the Foreign Assistance Act of 1961 (P.L. 87-195, 75 Stat. 424, September 4, 1961) authorized the President "to furnish military assistance . . . to any friendly nation, the assisting of which the President finds will strengthen the security of the United States." (Sect. 503.) Using the court's interpretation of the appropriations acts, these words would permit the President to begin a war anywhere he chose at any time as long as he could find a "friendly nation" to assist. Clearly Congress had no such thought in mind.

The third formula (P.L. 90-5, appendix p. 38a) was used only once. Its legislative history makes clear it was

not designed to have any substantive significance. 113 *Cong. Rec.* 4941 ff., 5115 ff.

At the very outset of the Congressional debates on Vietnam authorization and appropriations bills, key Congressional figures made clear that they were *not* to be considered as determining policy in any way or as authorizing any military moves by the Executive. See remarks of Senator Richard Russell, Chairman of the Senate Armed Services Committee at p. 51a of the appendix. This view was constantly expressed by Congressional leaders both supporting and opposing the government's war policy.[14]

CONCLUSION

As noted above, the fact that this Court has not spoken on the legality of the Executive's steps in Vietnam has led to endless confusion by all the branches of government and among the people as to the meaning of the war power clauses. A denial of review in this case will perpetuate that confusion. Until constitutional responsibility is firmly fixed by this Court, the nation will continue to question the constitutional legitimacy of any military action that the government takes in the future.

The political arms of the government can readily adjust to any determination this Court makes and assign appropriate duties and responsibilities. As Judge Dooling said below: "the only consequence can be resumption of con-

[14] In the proceedings below, Professor Don Wallace, Jr. of the Georgetown University Law Center submitted a thirty-two page affidavit analyzing the eighteen laws passed by Congress relating to military expenditures from 1965 to 1970. Printed copies of the appendix on appeal below have been made available to the clerk of the court so that the Court may examine that legislative history (see pp. 52A-83A of the Appendix in *Berk* v. *Laird*).

formity to constitutional norms of political conduct to achieve, dilute or reverse the desired political objectives." 317 F. Supp. at 1016.

The consequences of continued silence by this Court on Vietnam can only be confusion, unrest, and continued uncertainty about any future military action. The nation requires a final answer to these questions which have so troubled and perplexed our society.

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

First Court of Appeals Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 900—September Term, 1969.

(Argued June 17, 1970 Decided June 19, 1970.)

Docket No. 35007

MALCOLM A. BERK,

Plaintiff-Appellant,

—v.—

MELVIN LAIRD, individually, and as Secretary of Defense of the United States, STANLEY S. RESOR, individually, and as Secretary of the Army of the United States, and COL. T. F. SPENCER, individually, and as Chief of Staff, United States Army Engineers Center, Fort Belvoir,

Defendants-Appellees.

Before:

ANDERSON and FEINBERG, *Circuit Judges,* and MACMAHON, *District Judge.**

ANDERSON, *Circuit Judge*:

Malcolm A. Berk, a private first class enlisted in the United States Army, received orders on April 29, 1970, requiring him to report to Fort Dix, New Jersey, for dis-

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* Of the Southern District of New York, sitting by designation.

patch to South Vietnam. On June 3, he commenced an action against the Secretary of Defense, Secretary of the Army, and the officer who signed his orders, contending that these executive officials of the United States Government have exceeded their constitutional authority by commanding him to participate in military activity not properly authorized by Congress. His complaint alleges that these orders violate rights protected by the Fifth, Ninth, Tenth and Fourteenth Amendments to the Constitution, as well as §5 of the New York Civil Rights Law,[1] and that jurisdiction is appropriate under 28 U.S.C. §1331(a).[2] Berk seeks a judgment declaring that his superiors are without authority to order him to South Vietnam or Cambodia,[3]

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[1] This section provides that:

"No citizen of this state can be constrained to arm himself, or to go out of this state, or to find soldiers or men of arms, either horsemen or footmen, without the grant and assent of the people of this state, by their representatives in senate and assembly, except in the cases specially provided for by the constitution of the United States."

The present statute is based upon the New York Bill of Rights of 1787 (1 N.Y. Laws, 1801 Revision at 48-49) and is identical to Chapter IV, §4 of the New York Revised Statutes of 1829 (1 N.Y. Rev. Stat. of 1829 at 92). The original derivation of the provision dates to the Petition of Rights (1628 ¶1) and the Declaration of Rights, 2 Wm. & Mary c. 2 art. 4 (1689).

[2] The complaint also alleges that jurisdiction may be based on 28 U.S.C. §1332(a) and "5 U.S.C. §1009(a)" (apparently referring to the provision recently recodified as 5 U.S.C. §702).

[3] Appellant's counsel vigorously argued before the district court that there was a possibility Berk would receive additional orders in the future to take part in military activities in Cambodia, and that the court therefore should give separate consideration to the legality of such orders. The district court properly held this contingency unlikely in view of presidential declarations that American military forces will be removed from Cambodia by June 30, 1970; and the appellant has treated the issues as virtually indistinguishable on this appeal.

and he also demands a permanent injunction forbidding them to do so.

At a hearing on June 5, the district court denied a preliminary injunction on the grounds that the balance of equities inclined toward the Government because, among other reasons, if Berk succeeded in obtaining a preliminary injunction, there would be a flood of similar applications which would have to be granted, thereby causing "a drastic interference with the war effort" by a decision on a preliminary motion. The court also felt that there was "less than an even chance for the plaintiff to succeed even in establishing the right to review in this case."

As the appellant correctly points out, the issue on this appeal is not whether the courts are empowered to "second-guess" the President in his decision to commit the armed forces to action, but whether they have the power to make a particular kind of constitutional decision involving the division of powers between legislative and executive branches. See, e.g., *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952). The appellees' position is essentially that the President's authority as Commander in Chief, in the absence of a declared war, is co-extensive with his broad and unitary power in the field of foreign affairs. See *United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304 (1936); cf. *Johnson* v. *Eisentrager,* 339 U.S. 763, 789 (1950) (dictum). If this were the case, Berk's claim would not be justiciable because the congressional power to "declare" a war would be reduced to an antique formality, leaving no executive "duty" to follow constitutional steps which can be judicially identified. See *Powell* v. *McCormack,* 395 U.S. 486, 516-18 (1969); *Baker* v. *Carr,* 369 U.S. 186, 198 (1962). However, the power to commit American military forces under various sets of circumstances is shared by Congress and the executive. History

makes clear that the congressional power "to declare War" conferred by Article I, section 8, of the Constitution was intended as an explicit restriction upon the power of the Executive to initiate war on his own prerogative which was enjoyed by the British sovereign. Although Article II specifies that the President "shall be Commander in Chief of the Army and Navy of the United States" and also vests the "executive power" in him and requires that he "take Care that the Laws be faithfully executed," these provisions must be reconciled with the congressional war power. See generally Note, *Congress, the President, and the Power to Commit Forces to Combat,* 81 Harv. L. Rev. 1771 (1968); Velvel, *The Vietnam War: Unconstitutional, Justiciable and Jurisdictionally Attackable,* 16 Kan. L. Rev. 449 (1968). Since orders to fight must be issued in accordance with proper authorization from both branches under some circumstances, executive officers are under a threshold constitutional "duty [which] can be judicially identified and its breach judicially determined." *Baker* v. *Carr, supra,* 369 U.S. at 198.

Even if it possesses this general attribute of justiciability, however, a claim still may not be decided if it involves a political question, as that term is defined in *Baker* v. *Carr, supra,* at 217. The challenge framed at this point by the appellant—"which branch has the power to decide if an order has been issued in violation of the Constitution"—may not be answered by stating that courts alone inevitably pass upon allegations of constitutional violations, as Berk seems to suppose. If the issue involved in this case is "political," Congress and the executive will "decide" whether there has been a usurpation of authority by the latter, through political means.

The political question doctrine itself requires that a court decline to adjudicate an issue involving "a lack of

judicially discoverable and manageable standards for resolving it," *Baker* v. *Carr, supra,* 369 U.S. at 217. If the executive branch engaged the nation in prolonged foreign military activities without any significant congressional authorization, a court might be able to determine that this extreme step violated a discoverable standard calling for *some* mutual participation by Congress in accordance with Article I, section 8. But in this case, in which Congress definitely has acted, in part expressly through the Gulf of Tonkin Resolution and impliedly through appropriations and other acts in support of the project over a period of years, it is more difficult for Berk to suggest a set of manageable standards and escape the likelihood that his particular claim about this war at this time is a political question. It may be that he will be able to provide a method for resolving the question of when specified joint legislative-executive action is sufficient to authorize various levels of military activity, but no such standard has as yet been presented to us, although we do not foreclose the possibility that it can be shown at the hearing on the permanent injunction. Even if a distinction can be drawn between offensive and defensive conflicts and if some rather explicit congressional authorization is required for the former, there still remains the problem of determining whether a broad approving resolution followed by non-repeal meets the proposed criterion of "explicit" approval. See *United States* v. *Sisson,* 294 F. Supp. 511, 515 (D. Mass. 1968).

Finally, even if Berk is able to show that his claim does not raise an unmanageable political question, he will be required to show the district court that congressional debates and actions, from the Gulf of Tonkin Resolution through the events of the subsequent six years, fall short of whatever "explicit approval" standard he propounds. This will

involve a multitude of considerations concerning which neither the district court nor this court has been adequately informed, and we cannot, in good conscience, now say that the appellant has shown probability of success on the merits if this stage is reached, although once again we do not foreclose the appellant from seeking to establish his claims.

In summary, the appellant raises a claim which meets the general standard of justiciability set out in *Powell* v. *McCormack, supra,* and *Baker* v. *Carr, supra,* but must still be shown to escape the political question doctrine. Even though he has perhaps raised substantial questions going to the merits, neither the likelihood of success nor the balance of equities inclines so strongly in his favor that a preliminary injunction is required. *Checker Motors Corp.* v. *Chrysler Corp.,* 405 F.2d 319 (2 Cir. 1969). As to the latter, we add to the considerations mentioned by the district court the fact that Berk did enlist a year ago presumably fully aware of the Vietnam conflict. The parties have expressed their readiness to proceed immediately, so that additional risks to which Berk might be subjected during the very brief interval before the district court acts are highly speculative. Nor do we see any necessity for Berk's physical presence at or in preparation for the district court proceedings. Berk's absence would not moot the underlying action. The facts concerning Berk on which the action is predicated are undisputed and there remain only the basic legal and constitutional issues and facts relevant thereto.

Berk's jurisdictional allegation relying on 28 U.S.C. §1331(a) has been challenged; but the complaint can be construed as putting in controversy his future earning capacity, which serious injury or even death might diminish by an amount exceeding $10,000. See *Friedman* v. *International Ass'n of Machinists,* 220 F.2d 808, 810 (D.C. Cir.),

cert. denied, 350 U.S. 824 (1955); *Walsh* v. *Local Bd. No. 10,* 305 F. Supp. 1274, 1275-76 (S.D.N.Y. 1969); cf. *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.,* 303 U.S. 283, 289 (1938); *Eisen* v. *Eastman,* 421 F.2d 560, 566-67 (2 Cir. 1969). Sovereign immunity is no bar to this action, since the complaint alleges that agents of the Government have exceeded their constitutional authority while purporting to act in the name of the sovereign. *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 689-91 (1949). The requested relief does not require affirmative governmental action, but only that the agent involved cease certain allegedly improper conduct. *Id.* at 691, n. 11; cf. *State of Washington* v. *Udall,* 417 F.2d 1310, 1317-18 (9 Cir. 1969). Although the rule has long been that the alleged "illegality" of a war may not be raised as a defense to prosecution for refusal to submit to induction into the armed forces, *United States* v. *Mitchell,* 369 F.2d 323 (2 Cir. 1966), *cert. denied,* 386 U.S. 972 (1967); *United States* v. *Bolton,* 192 F.2d 805 (2 Cir. 1951), this court indicated in *Bolton* that "any question as to the legality of an order sending men to Korea to fight in an 'undeclared war' should be raised by someone to whom such an order has been directed." 192 F.2d at 806 (dictum). The rule should be the same for a soldier ordered to Vietnam under allegedly similar circumstances.

The denial of a preliminary injunction is affirmed and the case is remanded to the district court for further proceedings consistent with this opinion. The current stay of the military orders detaching appellant to South Vietnam shall expire and the mandate shall issue seven days from the date hereof to allow appellant to seek further relief in the Supreme Court. It is also suggested that the proceedings in the district court on the underlying action proceed with expedition.

So ordered.

Memorandum Incorporating Findings of Fact and Order Denying Injunction

UNITED STATES DISTRICT COURT

E. D. NEW YORK

No. 70 C 745

SALVATORE ORLANDO,

Plaintiff,

—v.—

MELVIN LAIRD *et al.*,

Defendants.

July 1, 1970

DOOLING, *District Judge*:

Plaintiff, on June 11, 1970, commenced this action against the Secretary of Defense and the Secretary of the Army praying (a) a declaration that the defendants are without authority to order plaintiff to Indochina, (b) an injunction against defendants so ordering him, (c) a declaration that defendants are without authority to order plaintiff to comply with an order, already issued, directing him to report to Fort Lewis, Washington, for shipment to Indochina, (d) an injunction against defendants' compelling plaintiff to comply with the order or any order of similar tenor, and (e) for other relief. The complaint is (1) that New York Civil Rights Law, McKinney's Consol.

Laws, c. 6, §§ 2, 5 and the Constitution of the United States alike forbid such action as underlies the order issued to plaintiff, a citizen of New York, unless it be founded on action of the Congress taken pursuant to the United States Constitution, and the Congress has not taken that action, (2) that New York State joined in forming the Union only upon the terms expressed in the United States Constitution (cf. the Tenth Amendment) and reiterated in Civil Rights Law § 5, and plaintiff's particular rights as a citizen of New York have been violated by the order in question since the order is not based on action taken pursuant to the United States Constitution, (3) that for the reasons set forth in (2) and because the Indochina combat activities violate national treaty obligations, the order violates plaintiff's rights under the Fifth (due process), Ninth (grant of enumerated powers does not imply denial of others to the people), Tenth (powers not granted to United States nor prohibited to States reserved to States and to people), and Fourteenth (State due process, equal rights, etc.) Amendments, and (4) that for reasons set forth in (2) and (3) the order violates plaintiff's right not to be called on to participate in combat activities of the kind being conducted in Indochina which involve violations of the humane-war treaty obligations of the country, the United States Law of Land Warfare as set forth in Army Field Manual 27–10, and the Nuremberg Principles of International Law as formulated by the United Nations International Law Commission, June-July 1950, and are exemplified by (a) killing non-combatants, (b) using forbidden chemicals, (c) violating prisoners' rights, (d) pillaging and destroying civilian habitations and religious buildings, (e) failing to provide medical aid for wounded enemy soldiers and civilians, (f) bombing populated areas,

(g) impairing agricultural land, and (h) taking and destroying food and medical supplies.

Plaintiff is a citizen of the United States and of the State of New York. He first enlisted in the United States Army on November 11, 1965, and reenlisted on May 8, 1968. His rating is Specialist E5, Ordnance, Aviation, and his special skill is in relation to aviation repair parts and their supply to damaged aircraft. He has never been court-martialled or otherwise disciplined. He has heretofore served in Thailand, for eleven months and seventeen days. After his re-enlistment plaintiff was disappointed in his expectation of assignment; he was doing routine supply work, unrelated to aviation repair-part supply, which he thought any private could do. Without advising his wife that he was doing so, he wrote a letter in November 1969 volunteering for Vietnam service. Later, in February 1970, and probably in the light of his wife's extreme distress at his possible re-assignment to Southeast Asia, he wrote a letter to General Westmoreland. In it he did not express any moral or conscientious objection to the war, but put his unwillingness to return to Asia on the ground of his family situation. At that time he was satisfied that the Government was committed in bringing men out of Vietnam on a fixed schedule and thought that it was the best thing that could be done. However, when the Cambodian incursion occurred, he feared the whole conflict would be widened, and he had no confidence that the Government's later statements about withdrawal would be carried out. He had, somehow, lost his much earlier confidence that the entire effort was justifiably and rightly directed toward preventing the Communists from taking over more and more land in Asia—where there is more than half the world's population. After Cambodia he began to think

that he might be sent into Cambodia or reassigned to be a door gunner on a helicopter. He remembered being told of, and continued to hear of, and to see on television, episodes in which soldiers fired on people they could not be sure were soldiers or even men; he heard stories of barbarisms committed on prisoners; he realized that when he reached Vietnam he would be issued an M-16 and 90 rounds of live ammunition; as he put it (Tr. 84), "They are asking me to kill by giving me that weapon in Vietnam." He felt, after Cambodia, that (Tr. 85) "they are going to come back strong and I don't want to be there when it happens. I can't see what there is much to get killed over there, I can't see dying for those Southeast Asians, the entire lot of them don't like Americans, at any one time they stab you in the back, I can't see that kind of people, I can't see myself dying for them." Again, he put it (Tr. 110), " * * * and I am scared that * * * I might have to kill somebody that shouldn't have to be killed, and it would be on my conscience, and I just can't see my killing anybody, I have never done it before and I don't ever want to do it." Explaining his fear, he said (Tr. 118-119), " * * * I just couldn't see me climbing up on a helicopter and shooting * * * and he told me * * * they just would see a movement, and even though they didn't know what it is they would just shoot at it anyway, and that's when I started to say that ain't for me * * *. Well, if that is true, I just, I couldn't do it * * * it would be the first time I disobeyed an order because I wouldn't shoot if I was a door gunner unless possibly they were shooting at me, it's either them or me." His frame of mind became (Tr. 120-121), "I am not willing to serve, if I had to go, I mean if I was forced to go I would go because I don't want to go to jail."

Plaintiff received orders placing him on home leave and directing him thereafter to report on June 14, 1970, to Fort Lewis, Washington, for shipment to Vietnam. His orders were later changed to extend the date to June 23, 1970.

Before commencing the action for relief from the order, and after first speaking to counsel, plaintiff had misgivings about suing; he did not want to get into any trouble with the Army about it; he advised the Department of the Army of his intended action, and he believed that he had the Department's assurance that there would not be any kickback on it provided his lawyers kept him out of trouble, and kept in touch with the Department's lawyer at Fort Monmouth and so kept the Department advised of what happened (Tr. 98-100). Thereafter the present action was commenced.

It is concluded that an injunction *pendente lite* is not warranted. The order is authorized in the constitutional sense. Whether other avenues of relief are open to plaintiff under Army procedures in view of his present conscientious attitude toward Vietnam combat is not properly involved in this action.

[1, 2] The constitutional provisions relating to war and the military are given in the Appendix to this opinion. In the light of Berk v. Laird, 429 F.2d 302, 2d Cir. 1970, it is seen that the question of the validity of the order to plaintiff is justiciable, and the immediate issue is whether the matter is specifically decidable by standards of the kind that the judiciary have found manageable. No unusual subject matter is presented. Decisions in the entire area of the taking and arresting of combat action are exclusively political in kind, but determining whether or not a political decision has been taken by the appropriate set of governmental acts inescapably presents a purely judicial ques-

tion when the existence or non-existence of a valid political authorization as the source of a particular command is drawn in question by one directly affected by it in his individual liberty as a citizen. The fear that judicial decision—by injunction or habeas corpus—could produce an effect of a scope and nature usually absorbed in political action is unreal. Necessarily based on identification of a defect in authorization, the only consequence can be resumption of conformity to constitutional norms of political conduct to achieve, dilute, deflect or reverse the desired political objectives. Neither the range of political invention nor the content of political decision concerning the deployment and use of combat force is determinable or terminable by judicial decisions that unflinchingly point to and insist upon compliance with the required constitutional components of any political decision to commence, continue and terminate the use of the nation's combat resources in men and materials.

[3] Neither the language of the Constitution nor the debates of the time leave any doubt that the power to declare and wage war was pointedly denied to the presidency. In no real sense was there even an exception for emergency action and certainly not for a self-defined emergency power in the presidency. The debates, so often strangely—to our ears—devoid of respect for and alive with fears of the presidency that the Convention was forming, are clear in the view that (as Wilson put it) the power to make war and peace are legislative (1 Farrand, Records of the Federal Convention of 1787 (Rev.Ed.1937, Repr. 1966) 65, 73). The issue was where to poise it. Mason was concerned that "The purse & the sword ought never to get into the same hands (whether Legislative or Executive.)". 1 Farrand

139-140. The draft presented by the Committee of Detail on August 6, 1787, expresses the power as the power "To make war" (2 Farrand 182) and on August 17th that language was amended (2 Farrand 318-319) to read "To declare war"—Madison and Gerry so moving on the ground of its "leaving to the Executive the power to repel sudden attacks"; Sharman thought "make" the better word for the amenders' purposes—"The Executive shd. be able to repel and not to commence war. 'Make' better than 'declare' the latter narrowing the power too much"; to which Gerry answered that he "never expected to hear in a republic a motion to empower the Executive alone to declare war"; Elseworth thought the cases of "making *war*" and "making *peace*" materially different—"It shd. be more easy to get out of war, than into it. War also is a simple and overt declaration peace attended with intricate & secret negociations"; Mason opposed granting the power either to the Executive (as Butler had proposed on the ground that he had "all the requisite qualities, and will not make war but when the Nation will support it") "because not [safely] to be trusted with it," or to the Senate (as Pinkney had proposed) "because not so constructed as to be entitled to it. He was for clogging rather than facilitating war; but for facilitating peace. He preferred 'declare' to 'make' "; the motion to substitute "declare" for "make" was then agreed to. Pinkney's motion to strike the clause entirely, and Butler's motion "to give the Legislature power of peace, as they were to have that of war," by adding "and peace" after "war," were both lost (2 Farrand 319).

The language of the Constitution makes the war power a legislative power rather than an executive power, and it makes it a federal power rather than a state power, without in either instance negating the co-existence of a duty to

repel attack or actual invasion. Nothing relevant flows from the designation of the president as commander-in-chief of the armed forces except to confirm that his executive power includes the power to "conduct" wars declared by legislative act (cf. 2 Farrand 319, footnote), to deny autonomy to the military, and to locate the fountainhead of necessary emergency combat initiatives when the straitness of the exigency denies the Congress the time to act.

The genuine questions presented by the combat activities in Vietnam are whether the activities constitute "war," or are a genus of Governmental activity that cannot be characterized as war, whether, if the latter, they can be authorized by the Executive, and, if they are "war" or otherwise are beyond the authority of the Executive, whether they have been authorized by legislative action. Plaintiff contends that the Vietnam combat activities are "war" and require explicit Congressional sanction that cannot be found in the Tonkin Gulf resolution, 78 Stat. 384, the appropriation acts, the extension and amendment of the Selective Service Act, and other such supportive acts. The defendants argue broadly that there exists a genus of combat activities distinct from war that is only politically definable, that historically the presidency has dealt with these usually exigent situations without Congressional authorization or constraint, and that, so far as the Vietnam combat activities are concerned, they do not constitute "war," they are within the range of recognized presidential powers, and, whatever their precise classification, have been ratified and authorized by repeated Congressional actions which may also be viewed as a cumulative and authoritative political determination that the action of the presidency is not usurpation of legislative authority.

The historic examples of the variety of the occasions on which the presidency has used combat force, or deployed the military as a threat of such force (given to considerable extent in Wormuth, The Vietnam War: The President versus the Constitution, 1968, 21-35, in the United States Attorney's Brief in the *Berk* case in the Court of Appeals, and, summed up by classes in the ACLU Brief, pp. 6-8), and the examples of more or less specific Congressional authorizations of limited combat authority, do not solve the questions presented, but clearly indicate the difficulty and variety of the cases presented, and the absence of compelling judicial precedent. The instances having a magnitude approaching Vietnam (conspicuously the Korean instance) would inevitably have been, as Vietnam is, instances in which the only problem is to elucidate the nature and effect of Congressional responsibility for the waging of the combat activity.

The Constitution does not simply make the power to declare war a legislative power, it makes the related powers over the military, their provision and their governance equally matters of legislative concern, and extends the legislative power to calling up the militia to repel invasion and even to the granting of letters of marque, a species of authorized predation seemingly of a dimension to concern the Executive rather than to involve the legislative process. The systematic vesting of control over the means and the determination of the occasions of belligerency in the Congress makes inevitable that no combat activity of magnitude in size and duration can continue without affirmative and systematic legislative support. That Vietnam long ago attained that magnitude is history. It is, therefore, needless to stop now to decide whether the aggregate of the Con-

stitutional provisions and the debates in the constitutional convention teach that no combat initiative is lodged in the presidency or in the states nor any authority to take combat action except where defensive exigency requires it and time does not admit of a resort to Congress or to decide whether, beyond peradventure, there can be no presidential power to take combat initiatives where the question whether or not to do so involves a political determination of national policy and is not compelled by military exigency. *Cf.* Indochina: The Constitutional Crisis, reprinted, Congressional Record May 15, 1970, pp. S 7117-S 7123.

The military activities of the United States in Vietnam have been a central national political issue for years; no issue has been more bitterly, if not honestly, debated. The outcome of two presidential elections has reputedly been influenced if not determined by the candidates' positions on the issues; a very considerable number of elections to Senate and to House have reportedly been influenced if not determined by the Vietnam issue. Reports of public opinion samplings on Vietnam issues are regular news staples. The statistical measures, in lives of men, numbers of wounded, annual cost in money, and in men engaged, are doubtless the most publicized statistics in recent history. The Congress, particularly, has been deeply concerned in the issue, and its implementation of the Vietnam combat activities has been complete and unstinting.

The huge appropriations annually voted to sustain the expanding combat activity cannot be read out of being as extorted by the exigencies created by presidential seizures of combat initiatives. *Cf.* Congress, the President, and the Power to Commit Forces to Combat, 1968, 81 Harv.L.Rev. 1771, 1801. The power of the purse was lodged in the House and the appropriation power was expressly limited

when exercised to raise and support armies as part of the conscious constitutional scheme for controlling the Executive's resort to combat activities. Specific appropriation statutes here, as the Government's brief points out, leave no uncertainty about Congressional will and purpose. The repeated amendment of the Selective Service Act with, inevitably, the knowledge that the numbers drafted were determined in large part by the demands of the expansion in the number of men committed to Vietnam combat and, later, by the need to maintain the rotation of men to Vietnam, has been a specific and purposeful provision of men to the continuance of the combat activity. Even in modest points of legislative detail, Congressional concern in the combat activities is perfectly explicit and advertent. For Veterans' Benefits purposes "period of war" has now been defined by the Congress as including "the Vietnam Era" which in turn is defined as the period beginning August 5, 1964, and to end upon still future Presidential proclamation or concurrent resolution of the Congress. 38 U.S.C. § 101(11), (29). Aliens are relieved of paying naturalization fees if they have served in the armed forces between February 28, 1961, and the future date to be designated by Presidential Executive Order as the date of the termination of the Vietnam hostilities.

It is passionately argued that none of the acts of the Congress which have furnished forth the sinew of war in levying taxes, appropriating the nation's treasure and conscripting its manpower in order to continue the Vietnam conflict can amount to authorizing the combat activities because the Constitution contemplates express authorization taken without the coercions exerted by illicit seizures of the initiative by the presidency. But it is idle to suggest that the Congress is so little ingenious or so inappreciative

of its powers, including the power of impeachment, that it cannot seize policy and action initiatives at will, and halt courses of action from which it wishes the national power to be withdrawn. Political expediency may have counseled the Congress's choice of the particular forms and modes by which it has united with the presidency in prosecuting the Vietnam combat activities, but the reality of the collaborative action of the executive and the legislative required by the Constitution has been present from the earliest stages.

It is urged that evidence can be produced to demonstrate, in effect, that a steady course of executive usurpation of initiatives that, constitutionally, require the coaction of the Congress and the Executive has rendered the Congress impotent to withhold the grudging and involuntary appropriations and implementing laws relied on as constituting its authorization of combat activities in Southeast Asia. But extended argument has brought out that the reference is to the now-familiar compilations and analyses of the combat occasions of the past coupled with proffered testimony of members of Congress that their supportive votes were coerced by the predicament in which unauthorized executive action had placed the lives of men and the honor of the nation and do not reflect a will to ratify usurped initiatives. That, however, is simply a charge of Congressional pusillanimity. Such evidence, and its extent and validity are not to be supposed, could only disclose the motive and could not disprove the fact of authorization. The Constitution presents the Congress with the opportunity for it, but it cannot compel the making of unpopular decisions by the members of Congress. The long-term trend of the basic initiatives of Government to emanate from the presidency—an outgrowth possibly of the duties imposed by Article II, Section 3—is not confined to the

context of foreign affairs and limited warfare, and it may as much reflect the necessities of national government today as the failure of the Congress itself to function effectively in the affirmative formation of national policy.

The place of the controversial Tonkin Gulf Resolution (Public Law 88-408, 78 Stat. 384) in the whole of Congressional action in unclear; its importance no doubt lay in its practical effect on the presidential initiative rather than its constitutional meaning, but it has not the compelling significance of the steady legislative support of the prosecution of the war.

The argument drawn from the New York Civil Rights Law falls with the conclusion that no defect exists in the constitutionality of the commitment of the nation to the combat activities in Vietnam.

[4, 5] The separate set of contentions revolving around the alleged contravention of treaty obligations and the conventions directed to securing humane conduct of war cannot alter the result. However unreal must be the expectation of universal compliance in the final test of combat conditions, every soldier is expected to abide by the rules of humane war and to avoid participation in war-crime. That it has been difficult to do that in Vietnam may be true, may be assumed for present purposes—the sincerity if not the balance of the testimony outlined in the offer of proof is assumed—but there is no escape from such problems. The famous correspondence between Generals Sherman and Hood at Atlanta exhibits the timeless dilemma. See 2 Sherman, Memoirs (Indiana University Press ed. 1957) 119-129. If the whole combat effort is a breach of peace-keeping obligations assumed by the nation in regularly adopted treaties, that does not, in the present stage of development of international law, in-

validate such a specific military order as plaintiff's. As between citizen and nation the citizen is bound by the national decision and must acknowledge its effect as an internally valid governmental act whether or not the nation is embarked on a breach of treaty obligation.

Accordingly, no case is made out for a preliminary injunction, and it is

Ordered the motion for a preliminary injunction is denied, except to the extent that the restraining order of June 12, 1970, is continued in effect as a temporary injunction made after notice and hearing until the close of the Court day on July 7, 1970, in order to give plaintiff an opportunity to seek relief from the present order.

Second Court of Appeals Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 477 and 478—September Term, 1970.

(Argued March 3, 1971 Decided April 20, 1971.)

Docket Nos. 35270 and 35535

SALVATORE ORLANDO,

Plaintiff-Appellant,

—v.—

MELVIN LAIRD, individually and as Secretary of Defense of the United States; and STANLEY R. RESOR, individually and as Secretary of the Army of the United States,

Defendants-Appellees.

MALCOLM A. BERK,

Plaintiff-Appellant,

—v.—

MELVIN LAIRD, individually, and as Secretary of Defense of the United States, STANLEY R. RESOR, individually, and as Secretary of the Army of the United States, and COL. T. F. SPENCER, individually, and as Chief of Staff, United States Army Engineers Center, Fort Belvoir,

Defendants-Appellees.

Before:

LUMBARD, *Chief Judge*,
KAUFMAN and ANDERSON, *Circuit Judges*.

ANDERSON, *Circuit Judge:*

Shortly after receiving orders to report for transfer to Vietnam, Pfc. Malcolm A. Berk and Sp. E5 Salvatore Orlando, enlistees in the United States Army, commenced separate actions in June, 1970, seeking to enjoin the Secretary of Defense, the Secretary of the Army and the commanding officers, who signed their deployment orders, from enforcing them. The plaintiffs-appellants contended that these executive officers exceeded their constitutional authority by ordering them to participate in a war not properly authorized by Congress.

In Orlando's case the district court held in abeyance his motion for a preliminary injunction pending disposition in this court of Berk's expedited appeal from a denial of the same preliminary relief. On June 19, 1970 we affirmed the denial of a preliminary injunction in *Berk* v. *Laird*, 429 F.2d 302 (2 Cir. 1970), but held that Berk's claim that orders to fight must be authorized by joint executive-legislative action was justiciable. The case was remanded for a hearing on his application for a permanent injunction. We held that the war declaring power of Congress, enumerated in Article I, section 8, of the Constitution, contains a "discoverable standard calling for *some* mutual participation by Congress," and directed that Berk be given an opportunity "to provide a method for resolving the question of when specified joint legislative-executive action is sufficient to authorize various levels of military activity," and thereby escape application of the political question doctrine to his claim that congressional participation has been in this instance, insufficient.

After a hearing on June 23, 1970, Judge Dooling in the district court denied Orlando's motion for a preliminary injunction on the ground that his deployment orders were constitutionally authorized, because Congress, by "appropriating the nation's treasure and conscripting its manpower," had "furnished forth the sinew of war" and because "the reality of the collaborative action of the executive and the legislature required by the Constitution has been present from the earliest stages." *Orlando* v. *Laird*, 317 F. Supp. 1013, 1019 (E.D.N.Y. 1970).

On remand of Berk's action, Judge Judd of the district court granted the appellees' motion for summary judgment. Finding that there had been joint action by the President and Congress, he ruled that the method of congressional collaboration was a political question. *Berk* v. *Laird*, 317 F. Supp. 715, 728 (E.D.N.Y. 1970).

The appellants contend that the respective rulings of the district court that congressional authorization could be expressed through appropriations and other supporting legislation misconstrue the war declaring clause, and alternatively, that congressional enactments relating to Vietnam were incorrectly interpreted.

It is the appellants' position that the sufficiency of congressional authorization is a matter within judicial competence because that question can be resolved by "judicially discoverable and manageable standards" dictated by the congressional power "to declare War." See *Baker* v. *Carr*, 369 U.S. 186, 217 (1962); *Powell* v. *McCormack*, 395 U.S. 486 (1969). They interpret the constitutional provision to require an express and explicit congressional authorization of the Vietnam hostilities though not necessarily in the words, "We declare that the United States of America is at war with North Vietnam." In support of this construction they point out that the original intent of the clause was

to place responsibility for the initiation of war upon the body most responsive to popular will and argue that historical developments have not altered the need for significant congressional participation in such commitments of national resources. They further assert that, without a requirement of express and explicit congressional authorization, developments committing the nation to war, as a *fait accompli*, became the inevitable adjuncts of presidential direction of foreign policy, and, because military appropriations and other war-implementing enactments lack an explicit authorization of particular hostilities, they cannot, as a matter of law, be considered sufficient.

Alternatively, appellants would have this court find that, because the President requested accelerating defense appropriations and extensions of the conscription laws after the war was well under way, Congress was, in effect, placed in a strait jacket and could not freely decide whether or not to enact this legislation, but rather was compelled to do so. For this reason appellants claim that such enactments cannot, as a factual matter, be considered sufficient congressional approval or ratification.

The Government on the other hand takes the position that the suits concern a non-justiciable political question; that the military action in South Vietnam was authorized by Congress in the "Joint Resolution to Promote the Maintenance of Internal Peace and Security in Southeast Asia"[1]

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[1] The two district judges differed over the significance of the Tonkin Gulf Resolution, Pub. Law 88-408, 78 Stat. 384, August 10, 1964, in the context of the entire course of the congressional action which related to Vietnam. Judge Judd relied in part on the Resolution as supplying the requisite congressional authorization; Judge Dooling found that its importance lay in its practical effect on the presidential initiative rather than its constitutional meaning.

Although the Senate repealed the Resolution on June 24, 1970, it remained in effect at the time appellants' deployment orders issued. Cong. Record S. 9670 (June 24, 1970). The repeal was based on the

(the Tonkin Gulf Resolution) considered in connection with the Seato Treaty; and that the military action was authorized and ratified by congressional appropriations expressly designated for use in support of the military operations in Vietnam.

We held in the first *Berk* opinion that the constitutional delegation of the war-declaring power to the Congress contains a discoverable and manageable standard imposing on the Congress a duty of mutual participation in the prosecution of war. Judicial scrutiny of that duty, therefore, is not foreclosed by the political question doctrine. *Baker* v. *Carr, supra; Powell* v. *McCormack, supra.* As we see it, the test is whether there is any action by the Congress sufficient to authorize or ratify the military activity in question. The evidentiary materials produced at the hearings in the district court clearly disclose that this test is satisfied.

The Congress and the Executive have taken mutual and joint action in the prosecution and support of military operations in Southeast Asia from the beginning of those operations. The Tonkin Gulf Resolution, enacted August 10, 1964 (repealed December 31, 1970) was passed at the request of President Johnson and, though occasioned by specific naval incidents in the Gulf of Tonkin, was expressed in broad language which clearly showed the state of mind of the Congress and its intention fully to implement and support the military and naval actions taken by and planned to be taken by the President at that time in Southeast

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proposition that the Resolution was no longer necessary and amounted to no more than a gesture on the part of the Congress at the time the executive had taken substantial steps to unwind the conflict, when the principal issue was the speed of deceleration and termination of the war.

Asia, and as might be required in the future "to prevent further aggression." Congress has ratified the executive's initiatives by appropriating billions of dollars to carry out military operations in Southeast Asia[2] and by extending the Military Selective Service Act with full knowledge that persons conscripted under that Act had been, and would continue to be, sent to Vietnam. Moreover, it specifically conscripted manpower to fill "the substantial induction calls necessitated by the current Vietnam buildup."[3]

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[2] In response to the demands of the military operations the executive during the 1960s ordered more and more men and material into the war zone; and congressional appropriations have been commensurate with each new level of fighting. Until 1965, defense appropriations had not earmarked funds for Vietnam. In May of that year President Johnson asked Congress for an emergency supplemental appropriation "to provide our forces [then numbering 35,000] with the best and most modern supplies and equipment." 111 Cong. Rec. 9283 (May 4, 1965). Congress appropriated $700 million for use "upon determination by the President that such action is necessary in connection with military activities in Southeast Asia." Pub. L. 89-18, 79 Stat. 109 (1965). Appropriation acts in each subsequent year explicitly authorized expenditures for men and material sent to Vietnam. The 1967 appropriations act, for example, declared Congress' "firm intention to provide all necessary support for members of the Armed Forces of the United States fighting in Vietnam" and supported "the efforts being made by the President of the United States ... . to prevent an expansion of the war in Vietnam and to bring that conflict to an end through a negotiated settlement . . . ." Pub. L. 90-5, 81 Stat. 5 (1967).

The district court opinion in *Berk* v. *Laird*, 317 F. Supp. 715 (E.D.N.Y. 1970), sets out relevant portions of each of these military appropriation acts and discusses their legislative history.

[3] In H. Rep. No. 267, 90th Cong., 1st Sess. 38 (1967), in addition to extending the conscription mechanism, Congress continued a suspension of the permanent ceiling on the active duty strength of the Armed Forces, fixed at 2 million men, and replaced it with a secondary ceiling of 5 million. The House Report recommending extension of the draft concluded that the permanent manpower limitations "are much lower than the currently required strength." The Report referred to President Johnson's selective service message which said, " . . . that without the draft we cannot realistically

There is, therefore, no lack of clear evidence to support a conclusion that there was an abundance of continuing mutual participation in the prosecution of the war. Both branches collaborated in the endeavor, and neither could long maintain such a war without the concurrence and cooperation of the other.

Although appellants do not contend that Congress can exercise its war-declaring power only through a formal declaration, they argue that congressional authorization cannot, as a matter of law, be inferred from military appropriations or other war-implementing legislation that does not contain an express and explicit authorization for the making of war by the President. Putting aside for a moment the explicit authorization of the Tonkin Gulf Resolution, we disagree with appellants' interpretation of the declaration clause for neither the language nor the purpose underlying that provision prohibits an inference of the fact of authorization from such legislative action as we have in this instance. The framers' intent to vest the war power in Congress is in no way defeated by permitting an inference of authorization from legislative action furnishing the manpower and materials of war for the protracted military operation in Southeast Asia.

The choice, for example, between an explicit declaration on the one hand and a resolution and war-implementing legislation, on the other, as the medium for expression of congressional consent involves "the exercise of a discretion

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expect to meet our present commitments or the requirements we can now foresee and that volunteers alone could be expected to man a force of little more than 2.0 million. The present number of personnel on active duty is about 3.3 million and it is scheduled to reach almost 3.5 million by June, 1968 if the present conflict is not concluded by then." H. Rep. No. 267, 90th Cong., 1st Sess. 38, 41 (1967).

demonstrably committed to the . . . legislature," *Baker* v. *Carr, supra* at 211, and therefore, invokes the political question doctrine.

Such a choice involves an important area of decision-making in which, through mutual influence and reciprocal action between the President and the Congress, policies governing the relationship between this country and other parts of the world are formulated in the best interests of the United States. If there can be nothing more than minor military operations conducted under any circumstances, short of an express and explicit declaration of war by Congress, then extended military operations could not be conducted even though both the Congress and the President were agreed that they were necessary and were also agreed that a formal declaration of war would place the nation in a posture in its international relations which would be against its best interests. For the judicial branch to enunciate and enforce such a standard would be not only extremely unwise but also would constitute a deep invasion of the political question domain. As the Government says, " . . . decisions regarding the form and substance of congressional enactments authorizing hostilities are determined by highly complex considerations of diplomacy, foreign policy and military strategy inappropriate to judicial inquiry." It would, indeed, destroy the flexibility of action which the executive and legislative branches must have in dealing with other sovereigns. What has been said and done by both the President and the Congress in their collaborative conduct of the military operations in Vietnam implies a consensus on the advisability of *not* making a formal declaration of war because it would be contrary to the interests of the United States to do so. The making

of a policy decision of that kind is clearly within the constitutional domain of those two branches and is just as clearly not within the competency or power of the judiciary.

Beyond determining that there has been *some* mutual participation between the Congress and the President, which unquestionably exists here, with action by the Congress sufficient to authorize or ratify the military activity at issue, it is clear that the constitutional propriety of the means by which Congress has chosen to ratify and approve the protracted military operations in Southeast Asia is a political question. The form which congressional authorization should take is one of policy, committed to the discretion of the Congress and outside the power and competency of the judiciary, because there are no intelligible and objectively manageable standards by which to judge such actions. *Baker* v. *Carr, supra,* at 217; *Powell* v. *McCormack, supra,* at 518.

The judgments of the district court are affirmed.

KAUFMAN, *Circuit Judge* (concurring):

In light of the adoption by Congress of the Tonkin Gulf Resolution, and the clear evidence of continuing and distinctly expressed participation by the legislative branch in the prosecution of the war, I agree that the judgments below must be affirmed.

District Court Opinion in Kaplan

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

71-C-628

DOUGLAS KAPLAN,

Plaintiff,

—against—

MELVIN LAIRD, *et al.,*

Defendants.

July 7, 1971

JUDD, *J.*

MEMORANDUM AND ORDER

Plaintiff, an enlisted man in the United States Army on leave from service in Vietnam, has filed a complaint asking for a declaratory judgment enjoining the Secretary of Defense, the Secretary of the Army and the commanding officers at Fort Hamilton and Fort Dix from ordering him to go to Vietnam, and declaring that they are without authority to issue such orders because Congress has not issued a declaration of war or otherwise expressly authorized the current United States activities in Vietnam.

A motion for summary judgment has been brought on by the plaintiff by order to show cause. Defendants in turn have moved on short notice to dismiss the complaint under F.R.Civ.P. 12(b)(1) and (6) for lack of jurisdiction over the subject matter or for failure to state a claim on which

relief can be granted, or in the alternative for summary judgment under F.R.Civ.P. 56.

The issues presented in this action are substantially the same as those already decided by this court in *Berk* v. *Laird* (70-C-697), 317 F.Supp. 715, aff'd, F.2d (2d Cir. April 20, 1971), and by Judge Wyzanski in *Commonwealth of Massachusetts* v. *Laird,* Civil 71-419-W (D.Mass. June 1, 1971). The documents in the record and appendix in the *Berk* case are deemed to be part of the record in this case.

Defendants assert that plaintiff lacks standing to assert his claim, because he is presently attached to a Replacement Company at Fort Dix, New Jersey, under an order of this court entered in *Kaplan* v. *Laird,* 71-C-81, an action in the nature of mandamus, which is still pending. Since the order attaching plaintiff to a unit at Fort Dix was primarily for the purpose of resolving legal problems raised in 71-C-81, and he is subject to return to Vietnam if the issues in that case are resolved adversely to him, the court considers that he has a sufficient stake in determining the authority for sending military forces to Vietnam so that the case should be considered on the merits.

On the authority of the *Berk* case, the court rules that it has jurisdiction of the subject matter, but that defendants are entitled to judgment on the merits.

It is ORDERED that defendants' motion for summary judgment be granted, that defendants' other grounds for relief are denied, that plaintiff's motion for summary judgment be denied, and that the Clerk enter judgment dismissing the complaint on the merits without costs.

ORRIN G. JUDD
U.S.D.J.

Court of Appeals Opinion in Kaplan

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 71-1660—September Term, 1970

(Argued July 14, 1971 Decided July 14, 1971.)

DOUGLAS KAPLAN,

Plaintiff-Appellant

—against—

MELVIN LAIRD, et al.,

Defendants-Appellees.

Before:

FRIENDLY, *Chief Judge*
LUMBARD, *Senior Judge* and OAKES, *Circuit Judge.*

Per curiam: We affirm the judgment below on the authority of *Orlando* v. *Laird* and *Berk* v. *Laird*, —— F.2d —— (April 20, 1971), and direct that the mandate issue forthwith.

APPENDIX B

Constitutional and Statutory Provisions Involved

Constitution

Article I, Section 8

> The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; . . .
>
> To define and punish . . . Offences against the Law of Nations;
>
> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
>
> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two years;
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces;
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article II, Section 1

The executive Power shall be vested in a President of the United States of America. . . .

Article II, Section 2

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into actual Service of the United States; . . .

Statutes

Gulf of Tonkin Resolution ("Joint Resolution to promote the maintenance of international peace and security in Southeast Asia," P.L. 88-408, 78 Stat. 384, August 10, 1964)

Whereas naval units of the Communist regime in Vietnam, in violation of the principles of the Charter of the United Nations and of international law, have deliberately and repeatedly attacked United States naval vessels lawfully present in international waters, and have thereby created a serious threat to international peace; and

Whereas these attacks are part of a deliberate and systematic campaign of aggression that the Communist regime in North Vietnam has been waging against its neighbors and the nations joined with them in the collective defense of their freedom; and

Whereas the United States is assisting the peoples of southeast Asia to protect their freedom and has no territorial, military or political ambitions in that area, but desires only that these peoples should be left in peace to work out their own destinies in their own way:

Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.

Sec. 2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in Southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

Sec. 3. This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, except that it may be terminated earlier by concurrent resolution of the Congress.

Foreign Military Sales Act (P.L. 91-672, 84 Stat. 2053, January 12, 1971)

Sec. 12. The joint resolution entitled "Joint resolution to promote the maintenance of international peace and security in Southeast Asia," approved August 10, 1964 . . . is terminated effective upon the day that the second session of the Ninety-first Congress is last adjourned.

Defense Supplemental Appropriations Act, 1965 (P.L. 89-18, 79 Stat. 109, May 7, 1965)

For transfer by the Secretary of Defense, upon determination by the President that such action is necessary in connection with military activities in southeast Asia, to any appropriation available to the Department of Defense for military functions, to be merged with and to be available for the same purposes and for the same time period as the appropriation to which transferred, $700,000,000, to remain available until expended.

Supplemental Defense Authorization Act, 1966 (P.L. 89-367, 80 Stat. 36, March 16, 1966)

Sec. 401. (a) Funds authorized for appropriation for the use of the Armed Forces of the United States under this or any other Act are authorized to be made avail-

able for their stated purposes in connection with support of Vietnamese and other free world forces in Vietnam, and related costs, during the fiscal years 1966 and 1967, on such terms and conditions as the Secretary of Defense may determine.

Armed Forces Supplemental Authorization Act, 1967 (P.L. 90-5, 81 Stat. 5, March 16, 1967)

Sec. 401. The Congress hereby declares—

(1) its firm intentions to provide all necessary support for members of the Armed Forces of the United States fighting in Vietnam;

(2) its support of efforts being made by the President of the United States and other men of good will throughout the world to prevent an expansion of the war in Vietnam and to bring that conflict to an end through a negotiated settlement which will preserve the honor of the United States, protect the vital interests of this country, and allow the people of South Vietnam to determine the affairs of the nation in their own way; and

(3) its support for the convening of the nations that participated in the Geneva Conferences or any other meeting of nations similarly involved and interested as soon as possible for the purpose of pursuing the general principles of the Geneva accords of 1954 and 1962 and for formulating plans for bringing the conflict to an honorable conclusion.

APPENDIX C

Congressional Debates

Mr. Cranston. Mr. President, in at least two recent court cases, *Orlando* v. *Laird,* 70 C 745 (E.D.N.Y. 1970) and *Berk* v. *Laird,* No. 900 (2d Cir. 1970), where servicemen challenged the right of the Army to send them to fight, and perhaps die, in a war that they believe to be unconstitutional, the Nixon administration has advanced a disingenuous argument that Senators should be aware of.

The administration argues that Congress ratified the Vietnam war by appropriating the funds which were used to conduct that war. In addition, the administration argues that the Congress ratified the war by passing two Selective Service Acts under which young men were drafted and sent to Vietnam. . . .

Given the current debate over this country's Vietnam policy, one can hardly say that Congress has granted precise authority to wage war in Indochina. Whenever appropriations for the war come up for a vote, supporters claim that we cannot abandon our boys who are fighting there. Many Congressmen vote for the appropriations for that reason. Other Congressmen vote for the military appropriations bill so that our forces can be withdrawn safely from Vietnam at the earliest possible date.

To say that a Congressman ratifies the continuation and expansion of the Vietnam war when he votes for appropriations to protect American servicemen as they are withdrawn is a cruel deceit. It makes as much sense to argue that the Department of the Interior could grant leases to drill in the Santa Barbara Channel in the absence of explicit congressional authorization and relying only on congressional passage of the general appropriations for the Department of the Interior's ongoing activities. 116 *Cong. Rec.* S. 11818 (daily ed. July 21, 1970).

Mr. McGovern. In connection with our discussion, however, I do think it is pertinent to note the fashion in which constitutional issues are being drawn in court tests pending now. I refer specifically to two New York cases, *Orlando* against *Laird* in the U.S. District Court for the Eastern District of New York and *Berk* v. *Laird,* Docket No. 35007 in the U.S. Court of Appeals for the Second Circuit. . . .

It seems to me that these arguments and holdings have a direct bearing on the amendment. As I read them they say that approval of the appropriations used for the prosecution of a war is equivalent, in practical effect, to a declaration of war.

Mr. President, I have voted for most of the military appropriations bills which have been used for the war in Vietnam. At the same time, going back to 1963, I have firmly opposed our escalating involvement in that conflict. There has been no period of time in which I would have supported a declaration of war in Vietnam. I am sure I have not been unique in the Senate in feeling an obligation to provide full support to the young Americans who have been dispatched to Vietnam, while at the same time believing that they should be brought home. 116 *Cong. Rec.* S. 11987-11988 (daily ed. July 23, 1970).

Mr. Hatfield. As the Senator from Arkansas probably remembers, we had a recent court case entitled *Orlando* versus *Laird,* which was decided by the United States Court of Appeals on April 20, 1971. This was on an appeal from a lower District Court's action to challenge the constitutionality of the Vietnam War. . . .

Mr. Fulbright. Mr. President, will the Senator yield?

Mr. Hatfield. I yield.

Mr. Fulbright. There were two points in the case the Senator just referred to. I take it from what the Senator said that the court did not accept the view that a Commander in Chief, the President could do as he pleased. As the Senator emphasized, Congress, by authorizing the draft and appropriating the money exercises constitutional responsibility.

The Court did not say, did it, that as Commander in Chief he can wage the war any way he likes? Did it say that?

Mr. Hatfield. No.

Mr. Fulbright. I am glad to hear that. The Court, then, is not in complete agreement with the Secretary of State, or Mr. Katzenbach, or Mr. Acheson in their theory that Congress has no business in foreign relations and that the war power is obsolete. The Court did not agree with them, did it?

Mr. Hatfield. No.

Mr. Fulbright. I am glad to hear that. 117 *Cong. Rec.* S. 8044 (daily ed. June 2, 1971).

Mr. Fulbright. It was the first time my attention was called to that case, [Orlando], which, it seems to me, is extremely significant. As I indicated the other day, as a long-time principle, I was not convinced that a purely voluntary professional army was in the long-term interests of the country. I had until this matter was brought up, tentatively decided to vote for an extension of the draft. But I think this case is extremely significant. At least, it is to me. It is the first time such a decision has been brought to my attention. I think this is the first time the court has held as it did in this case, . . .

What this means is that if I vote to extend the draft under the present circumstances of the war in Vietnam, I am thereby endorsing the carrying on of that war. This has really caused me grave concern these last 2 days, since I got the full copy of the decision which I have inserted into the RECORD.

I am bound to say I do not like to think that by voting for the draft, which we have had on many occasions prior to the Vietnamese war, the court would infer from that action that I am thereby endorsing the policy which we are now following in Vietnam.

That inference is utterly inconsistent with what I and others have been trying to do in attempting to assure that the warmaking power resides in the Congress. I had never dreamed of not voting money for the Defense Department, which is a general appropriation. We all know we have to have a Defense Department, and I certainly am not going to vote to have no Defense Department. But in this case, we do not need the draft for this specific purpose. We have had the draft, in times past, when I did approve of the policy which required it.

But with this kind of interpretation by the Court, I find it very difficult to reconcile a vote for extension of the draft

at this time. That does not mean that at some future time, and under different circumstances, I would not vote for the draft. I am inclined to think that the infusion of civilian manpower into the Armed Forces is a good thing and consistent with the democratic process.

* * * * *

I have said to the Senator from Mississippi that, over the long term, as a matter of principle, I am not sold on a professional army, but I am also not sold on the war in Vietnam, as the Senator knows. I do not like to cast a vote that in the words of the court, looks like an endorsement of that war.

Mr. Stennis. Mr. President, will the Senator yield?

Mr. Fulbright. I yield.

Mr. Stennis. By the way, that is not a Supreme Court decision; it is a Court of Appeals decision.

Mr. Fulbright. The Court of Appeals of the Second Circuit.

Mr. Stennis. With all deference to the Court, that is a mere dictum, I have to say—an incidental thought there—because this is a manpower bill for all of our forces, as the Senator knows, and we could not possibly have anything except a remnant of the services, particularly in this sudden transition, unless we could pass the bill.

I appreciate greatly the Senator's sentiment. I have bottomed my argument on the point that this is not manpower just for the war—as some persons think it is—but the main thrust is for our defense here at home.

Mr. Fulbright. But is not the Senator disturbed about this interpretation that when we vote for this measure, we are in effect endorsing and authorizing the war? Why did we repeal the Gulf of Tonkin resolution? This raises a very serious constitutional question about which the Senator

from Mississippi and I were in complete agreement, and I refer to the commitment resolution, dealing with the role of Congress in taking this country into a war. The Senator, I believe, is as concerned about that as I am, and I think this puts a very serious light on it.

I do not think there is anything as important to the country as the cessation of this war at the earliest possible time. I have already committed myself publicly to support the Hatfield-McGovern amendment, which is a direct attack upon this issue through cutting off appropriations.

It would seem to me that if the opinion of this court, which is a circuit court of appeals, is the doctrine that it be followed, I would find myself embarrassed if I were to vote for the extension of the draft under the circumstances.

Has the Senator from Mississippi read this entire case, by the way? I have put it in the RECORD.

Mr. Stennis. Mr. President, if the Senator will yield, I know of it. But the court did not point out, now, how we could maintain our services, our ICBM's, our Polaris submarines, our nuclear carriers, without manpower of some kind. *When you vote for a bill, there are a lot of ingredients in it, and for the Court to single out that this vote is an endorsement of the war, it seems to me, misses the mark and is too broad by any standard.* (Emphasis added.)

* * * * *

Mr. Fulbright. What would be the Senator's attitude toward an amendment to the effect that a manpower bill is not to be construed as an endorsement of any particular war? That, so far as such a legislative act can be interpreted, in this case extending the drafting of men for the army, is not to be interpreted as this Court apparently did interpret it.

Mr. Stennis. Mr. President, I do not know that we could cover a point like that by legislative mandate. It is an argumentative matter, as the court argued it was, and I argued it was not.

To be frank, I do not think it is proper subject matter for an amendment, but it is a matter of commonsense that we would be left defenseless if we had to literally follow the court's reasoning. And I think we had better leave it on that ground.

Mr. Fulbright. Is that the equivalent of the Senator saying the court was wrong in the way it interpreted the matter.

Mr. Stennis. With all deference, yes.

Mr. Fulbright. I appreciate that statement, and I also think I agree with the Senator. This question of dealing with a constitutional question by legislative act is always rather difficult. However, the courts do use their powers of interpretation and inference in saying that such and such is the inference that Congress intended; and they use these measures, in effect, to read Congress' mind, or to infer that this is what Congress had in mind.

I certainly want to make it clear that I did not have that in mind when I have supported draft bills in the past. It never occurred to me that support was related to an endorsement of a specific conflict.

I have the same feeling about appropriations. I agree with the Senator from Mississippi that we have to have a military establishment, but I do not like this idea that thereby we endorse everything the Military Establishment does, or every policy of the President. This seems to me to be a distortion of the constitutional provision of the war powers. It strikes me that way and I wanted to put that into the RECORD, so that at least it can be considered further. 117 *Cong. Rec.* S. 8322-23 (daily ed. June 4, 1971).

The Presiding Officer. The Senate will be in order.

The clerk will state the proposed modification.

The assistant legislative clerk read as follows:

At the end of the bill add the following new section:

SEC. 302. Nothing in this or any other Act shall be deemed to constitute an authorization for conduct of military hostilities in Southeast Asia pursuant to the war powers of Congress as specified in article I, section 8 of the Constitution unless specifically authorized . . .

Mr. Javits. Mr. President, this is an amendment which was brought on by court decisions. What the amendment tries to do is to negative the court opinion that, either by passing the draft or military appropriations bills, Congress has given the President an authority, in conducting the war in Vietnam, over, above, or beyond whatever he otherwise has.

Let us remember, as it stands now, the President says he is depending upon his authority as Commander in Chief to liquidate a war which he found when he took office. He justifies his authority for everything, including Cambodia and Laos, on that ground. Nonetheless, Mr. President, we must also bear in mind that we have terminated the Gulf of Tonkin resolution. That resolution, however it may have been arrived at, whatever may have been the debate here, whatever may have been the representations made to the Senate at the time it was passed, was enacted and did give a broad mandate of authority to the President.

The Presiding Officer. The Senator's time has expired.

Mr. Javits. I yield myself 5 additional minutes.

Now that the Tonkin Gulf resolution is off the books, the question is, What is the constitutional power of the President in respect to conducting the Vietnam war?

This question has been tested in two cases, one in the Circuit Court of Appeals for the Second Circuit, the other

in the U.S. District Court for the District of Massachusetts.

The difficulty which we have been put into by these court decisions, Mr. President, is that they turned on the following issue: The issue was whether or not this was a political question, so that the court would refuse jurisdiction.

The court said the method by which Congress would give the President the authority to act in respect of the Vietnam war was political, and it would not deal with it. But the court said whether or not Congress gave the President authority was a legal question, and it would deal with that.

The court decision found an implied authority given by the Congress to the President from the fact that Congress had extended the selective service law, and had appropriated the money to carry out military operations in Southeast Asia.

The opinion has already been put in the RECORD. It is well known. It was the subject of a very distinguished colloquy between Senator Stennis and Senator Fulbright. Senator Stennis said then quite properly—I thoroughly agree with him, and I think it is worth quoting—

> "When you vote for a bill, there are a lot of ingredients in it; and for the court to single out that this vote is an endorsement of the war, it seems to me misses the mark and is too broad by any standard."

Then Senator Stennis said that he thought the lower courts were wrong—that is, the Circuit Court of Appeals and the District Court—about the decision they made that this was implied authorization. . . .

Mr. Stennis. I yield myself 8 minutes, or so much thereof as I may use.

Mr. President, I commend the Senator from New York for the substance as well as the tone of the remarks he has

made with respect to this amendment. Frankly, it is a matter that has troubled me from the beginning. . . .

One reason why I would not want the amendment to come to a vote—and this is with great deference to the author—is that there is no way to word an amendment of this type without leaving confusion of a different kind, because this would move in on the Constitution. With great deference to the court, I do not think any court, unless it is the Supreme Court of the United States, can change the Constitution by merely a conclusion, especially one that just goes to one point that was in many bills, such as the Selective Service Act and the appropriation bills that had already been passed. . . .

So I think it would be unfortunate for us to try now to refute a court—and it is not the highest court in the land—as to the question of a war authorization. I do not think we are called on to refute them. With great deference, I think that, as a whole, they erred, that they reached the wrong conclusion, and put the cart before the horse, if I may express it that way, or magnified the question they were deciding into one affecting the entire Selective Service Act. . . .

Mr. Javits. Mr. President. I have listened to the Senator from Mississippi with the greatest care. I realize and I hope that the courts will realize, the position into which they have placed us all. If we read the Court opinion, it is as bad for the affirmative as it is bad for the negative, and if there are going to be implications from adopting something, then there will be implications from rejecting something. So that the Senator is right when he says that this is a problem of great responsibility.

In order to help us, I am going to ask the Senator the following, and I hope he will understand the sense in which I ask it.

Mr. President, I feel we should not, at this time, press it upon this measure.

As I read the colloquy which the Senator from Mississippi had with the Senator from Arkansas (Mr. Fulbright), it really does not exactly meet the point, as he phrased the question. I think it is important to see whether the legislative history could be made crystal clear that no implication can or should be read into the passage of the Selective Service Act which could represent an implied congressional authorization of the Vietnam war. . . .

Is there anything in this act, if it becomes law, which may be deemed to constitute an authorization for the conduct of military hostilities in Southeast Asia pursuant to the war powers of Congress as specified in Article I, section 8 of the Constitution?

Mr. Stennis. I can certainly say to the Senator that, in my estimation, and as I interpret the Constitution, there are no provisions in the bill that would authorize the war in Vietnam as provided in article I, section 8 of the Constitution.

Mr. Javits. Would the Senator let me—

Mr. Stennis. May I add this—I think that so far as the bill is concerned, we are not trying directly to authorize or to terminate that war, not yet.

Mr. Javits. Or to imply any authority which has not been otherwise given?

Mr. Stennis. No. I think it does not imply any additional authority. Now it carries with it the manpower that will be used in Vietnam in connection with the war. There's no doubt about that. And the money bill that follows, presumably in the future, some of that money will be used for the war, as the Senator already knows. But there is no grant authority in the bill. So far as the war is concerned,

we are not doing any more than we are compelled to do, as I see it, to keep up our military forces. . . .

Mr. Javits. Mr. President, I asked the Senator from Mississippi, as the manager of the bill: Is there anything in this act which could be deemed to constitute an authorization by the Congress for the conduct of military hostilities in Southeast Asia pursuant to the war powers of Congress as specified in article I, section 8 of the Constitution?

Mr. Stennis. Mr. President, according to the interpretation of the Senator from Mississippi on article I, section 8, I do not think there is anything in the bill that would authorize the conduct of the war in Southeast Asia. . . .

Mr. Eagleton. I would like to ask the Senator an additional question.

I assume the Senator from Mississippi does not regard this bill, which provides for the conscription of young men to serve in the Armed Forces to provide for the national defense, as authority for the President to use them in any other way than the Constitution states. For instance, if young men are sent into Indochina war, does not Congress have to authorize such hostilities in accordance with the Constitution?

Mr. Stennis: My answer to that question is yes. Yes, that is correct. . . .

Mr. Javits. Mr. President, I believe we all certainly agree that this is a matter of such delicacy, involving a responsibility beyond that of an individual Senator, that it is prudent on this record not to press the amendment at this time. I reserve the right, based upon a reading and consideration of the whole record and any other amendment which may be offered to this bill, to urge this or some other revised version of the amendment on some other occasion before the time for consideration of amendments is up.

I withdraw the amendment. 117 *Cong. Rec.* S. 9685, 9686, 9687, 9688 (daily ed. June 22, 1971).

Senator Richard Russell. I do not wish to make a disingenuous argument, but I think it important that the Senate and the Nation clearly recognize this bill for what it is: an authorization of defense appropriations. It could not properly be considered as determining foreign policy, as ratifying decisions made in the past, or as endorsing new commitments.

That ours is a Government of three equal and coordinate branches and that there are checks and balances in this system are concepts we all learn in elementary civics. Under the Constitution, the President is the Commander in Chief of the Armed Forces. By approving or disapproving a bill of this type, Congress can neither enlarge nor diminish the President's power to command these forces; it merely can influence how many members of the Armed Forces the President has to command, and determine the nature of the equipment with which they will be provided, and how they will be cared for and protected.

* * * * *

Of course, I would not suggest that Congress does not have a role in the formulation of foreign policy. Under the division of legislative labor that Congress has prescribed for itself, the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs are the instrumentalities specializing in foreign relations. Accordingly, I think it is important to emphasize that it would be inappropriate for this authorization to be used as a poll of congressional opinion on whether our foreign policy is sound. In my opinion, such action would tend to oust the jurisdiction of the committees charged with primary responsibility for such consideration. Instead, I prefer to think of this authorization as facilitating the arming and equipping of person in the Armed Forces with the most effective weapons to assure their survival when they are carrying out the orders of their Commander in Chief. 112 *Cong. Rec.* 3135 (Feb. 16, 1966).

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No. 71-97

In the Supreme Court of the United States

OCTOBER TERM, 1971

SALVATORE ORLANDO, PETITIONER

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE, ET AL.

DOUGLAS KAPLAN, PETITIONER

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner Salvatore Orlando enlisted in the United States Army initially in November of 1965 and re-enlisted in May of 1968 for a three-year tour of duty. After receiving orders assigning him to combat duty in Indochina, Orlando instituted the present suit in the United States District Court for the Eastern District of New York, seeking declaratory and injunctive relief to prevent enforcement of those

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orders. The gravamen of his complaint is that, since the United States Congress has never issued a formal declaration of war or otherwise given explicit authorization for the current United States military activities in Indochina, the orders directing him to duty in Vietnam violate his rights under the Fifth, Ninth, Tenth and Fourteenth Amendments to the United States Constitution, under the United States' humane-war treaty obligations, and under Section 5 of the New York Civil Rights Law.[1] The district court (Dooling, J.) denied Orlando injunctive relief on the ground that his orders were constitutionally authorized (317 F. Supp. 1013, 1016; Pet. App. 8a, 12a), and Orlando appealed.[2] The Second Circuit affirmed,

[1] This section provides that: "No citizen of this state can be constrained to arm himself, or to go out of this state * * * without the grant and assent of the people of this state, by their representatives in senate and assembly, except in the cases specially provided for by the constitution of the United States."

[2] The court had held this case in abeyance until the Second Circuit decided *Berk* v. *Laird*, 429 F. 2d 302 (Pet. App. 1a–7a), which involved claims similar to those raised in *Orlando*. In *Berk*, the Second Circuit denied preliminary injunctive relief, but held that the claims met the general standards of justiciability set out in *Powell* v. *McCormack*, 395 U.S. 486, and remanded the case to the United States District Court for the Eastern District of New York (Judd, J.) to permit Berk to show that his claims did not raise an unmanageable political question. On remand, Berk's complaint was dismissed: the court found that Congress had authorized the United States' military activities in Southeast Asia and that the constitutional sufficiency of the method of that congressional authorization is a non-justiciable political question. *Berk* v. *Laird*, 317 F. Supp. 715 (E.D. N.Y.). An appeal was taken to the court of appeals and was consolidated with *Orlando* for consideration by the Second Circuit.

holding that, by its mutual participation with the Executive Branch of government, the Congress had authorized the United States' military activities in Indochina, and that "the constitutional propriety of the means by which Congress has chosen to ratify and approve the protracted military operations in Southeast Asia is a political question." (Pet. App. 22a–30a.)

Petitioner Douglas Kaplan enlisted in the United States Army in July 1969 for a three-year tour of duty. On May 25, 1971, while home on emergency leave from duty in Vietnam, he instituted the present suit in the United States District Court for the Eastern District of New York, seeking, on constitutional grounds similar to those raised in *Orlando*, declaratory and injunctive relief to prevent the issuance of orders directing him back to Vietnam. On July 7, 1971, the district court (Judd, J.) dismissed Kaplan's complaint (Pet. App. 31a–32a) on the authority of the court of appeals' decision in *Orlando* and the decision by the United States District Court for the District of Massachusetts in *Massachusetts* v. *Laird*, D. Mass., Civ. No. 71–419–W, decided June 1, 1971, a copy of which is reprinted as an appendix hereto at pp. 7–13 *infra*.[3] The court of appeals affirmed *per curiam* (Pet. App. 33a).

[3] Subsequent to the denial by this Court of the motion by the Commonwealth of Massachusetts for leave to file an original complaint seeking adjudication of the constitutionality of the United States' participation in the Vietnam war, *Massachusetts* v. *Laird*, 400 U.S. 886, Massachusetts and several individual state residents who are members of the armed forces filed a similar

1. Petitioners now ask this Court to declare unconstitutional the United States' participation in combat in Southeast Asia because, they argue, it has not been properly authorized by Congress. They seek essentially an adjudication of the proper division of war-making authority between the President and the Congress and a decision whether that allocation has been observed in connection with the conflict in Vietnam.

The issue raised here was before this Court recently on the motion by the Commonwealth of Massachusetts for leave to file a complaint in *Massachusetts* v. *Laird*, No. 42 Original, October Term 1970, motion denied, 400 U.S. 886. For the reasons stated in our brief in opposition in that case (No. 42 Original, at pp. 17–42), we submit that the issue is not susceptible of judicial determination or effective judicial relief and presents a non-justiciable political question. See *Baker* v. *Carr*, 369 U.S. 186; *Powell* v. *McCormack*, 395 U.S. 486; *Georgia* v. *Stanton*, 6 Wall. 50; *Luther* v. *Borden*, 7 How. 1.

2. There is no conflict among the circuits concerning challenges to the constitutionality of the United States military operations in Southeast Asia. The lower courts have regularly dismissed actions based

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complaint in the District Court of Massachusetts. The district court (Wyzanski, C.J.) dismissed the complaint on alternate grounds: that the issue presented is non-justiciable or that the claims presented, even if susceptible to judicial resolution, are without merit. See Appendix, *infra*, pp. 7–13. The decision is presently pending on appeal to the United States Court of Appeals for the First Circuit.

on the identical contention made here on grounds that the issue raised is a non-justiciable political question,[4] or that the suit was an unconsented suit against the United States,[5] or that the plaintiff was without standing to bring the suit.[6] In the four cases where district courts have failed to dispose of such a challenge on one or more of these grounds, three ruled against plaintiffs on the merits[7] and the other held only that the merits of such a challenge was justiciable.[8]

---

[4] See, *e.g.*, *Luftig* v. *McNamara*, 252 F. Supp. 819 (D. D.C.), affirmed, 373 F. 2d 664 (C.A. D.C.), certiorari denied, 387 U.S. 945; *Mora* v. *McNamara*, 387 F. 2d 862 (C.A. D.C.), certiorari denied, 389 U.S. 934; *Velvel* v. *Johnson*, 287 F. Supp. 846 (D. Kan.), affirmed, *sub nom. Velvel* v. *Nixon*, 415 F. 2d 236 (C.A. 10), certiorari denied, 396 U.S. 1042; *United States* v. *Sisson*, 294 F. Supp. 515 (D. Mass.); *Berk* v. *Laird*, 317 F. Supp. 715 (E.D. N.Y.), affirmed, *sub nom. Orlando* v. *Laird*, *supra*; *Davi* v. *Laird*, 318 F. Supp. 478 (W.D. Va.); *Massachusetts* v. *Laird*, *supra*; *Perkins* v. *Laird*, D. Minn., No. 4–71–Civ. 261, decided August 24, 1971; cf. *United States* v. *Holmes*, 387 F. 2d 781 (C.A. 7), certiorari denied, 391 U.S. 936.

[5] See, *e.g.*, *Luftig* v. *McNamara*, *supra*, n. 4; *Velvel* v. *Johnson*, *supra*, n. 4.

[6] See, *e.g.*, *Ashton* v. *United States*, 404 F. 2d 95 (C.A. 8), certiorari denied, 394 U.S. 960; *Kalish* v. *United States*, 411 F. 2d 606 (C.A. 9), certiorari denied, 396 U.S. 835; *Velvel* v. *Johnson*, *supra*, n. 4; and see *United States* v. *Bolton*, 192 F. 2d 805 (C.A. 2) (Korean war).

[7] The district court so ruled in the present cases, *Orlando* v. *Laird*, *supra*, 317 F. Supp. 1013 (Pet. App. 8a–21a), and *Kaplan* v. *Laird*, *supra* (Pet. App. 31a–32a), and, such was the ruling in the alternative in *Commonwealth of Massachusetts* v. *Laird*, *supra*.

[8] *Motolla* v. *Nixon*, 318 F. Supp. 538 (N.D. Calif.), appeal pending, C.A. 9, No. 26,662.

3. As we stated in our opposing brief, *Massachusetts* v. *Laird, supra,* at p. 42:

> * * * A President has great responsibilities, and many instances in our history show that these responsibilities are supported by adequate powers. Within the very widest limits, the President should not be hemmed in by the prospect of judicial supervision in the exercise of these powers. Indeed, this is the essence of Executive authority, exercised by one of the three great and coordinate branches of the government. Despite his considerable powers, however, no President has the ability to engage this country in prolonged hostilities without the support of Congress. A President violates the constitutional powers of Congress in this area at his peril—and Congress is the best judge of whether there has been a violation. This is an issue that should be resolved by the Congress and the Executive, and not by the Judiciary.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.

APPENDIX

United States District Court, District of Massachusetts

Civil Action No. 71–419–W

COMMONWEALTH OF MASSACHUSETTS, RICHARD ACKER, ET AL.

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE

OPINION, JUNE 1, 1971

WYZANSKI, C.J.:

The Commonwealth of Massachusetts and several individuals have filed a complaint against the Secretary of Defense. The individuals allege that they are inhabitants of Massachusetts who are members of the armed forces of the United States and are now being or will be required to serve in the conduct of armed hostilities in Southeast Asia. Plaintiffs seek to obtain an adjudication of the constitutionality of the United States' participation in the Vietnam War. Jurisdiction is invoked under 28 U.S.C. §§ 1331 and 1332.

The complaint prays that the United States' participation be declared "unconstitutional in that it was not initially authorized or subsequently ratified by congressional declaration", and that the Secretary "be enjoined from carrying out, issuing, or causing to be issued any further orders directing any of the above-named plaintiffs or any other inhabitant of the Commonwealth of Massachusetts to Southeast Asia for the purpose of participating in combat or sup-

porting combat troops in the Vietnam war, and from extending the tour of duty of any of the above-named plaintiffs or any other inhabitant of the Commonwealth who may be serving in the Vietnam war, said injunction to become effective ninety days from the date of entry of a decree in this cause in the event Congress shall not have acted within said ninety days to make a declaration of war or otherwise to approve, ratify or authorize United States participation in the Vietnam war."

Defendant has moved to dismiss the complaint on the ground, among others, that it "presents questions not susceptible to judicial determination."

The complaint must be dismissed on alternate grounds: either because it presents a controversy which lacks justiciability or because matters of which the court takes judicial notice show the complaint is without merit.

Except for the addition of the individual plaintiffs, the complaint at bar is in all important respects substantially the same as the complaint which the Supreme Court of the United States denied Massachusetts leave to file in that court. *Massachusetts* v. *Laird*, 400 U.S. 886, (Nov. 9, 1970). From a strictly technical view, the action of the Supreme Court does not control this court inasmuch as, absent an opinion, we cannot be sure whether that court's action was on a discretionary or on a jurisdictional basis. It is conceivable that the Supreme Court denied Massachusetts leave to file solely because there was another suitable forum. *Massachusetts* v. *Missouri*, 308 U.S. 1, 19–20, (1939). See Stern and Gressman, Supreme Court Practice, 4th ed., § 10.7, pp. 399–400. However, it is difficult to escape the inference, in the light of the dissenting opinion of Mr. Justice Douglas and

the explanations given by Mr. Justice Harlan and Mr. Justice Stewart for their dissenting votes, that the six justices who joined in denying Massachusetts leave to file its complaint in *Massachusetts* v. *Laird*, 400 U.S. 886, (Nov. 9, 1970) had concluded that Massachusetts lacked standing and that the controversy lacked justiciability.

But if this court is not technically bound by the Supreme Court's action in *Massachusetts* v. *Laird, supra,* it regards it as inappropriate, except in a case where he is virtually certain that he is on sound ground, for a district judge to refuse to follow the virtually unanimous authority of the lower federal courts to the effect that the issue here sought to be presented is non-justiciable. Of the cases in the lower courts one has special significance.

Luftig v. *McNamara,* 373 F. 2d 664, (D.C. C.A., 1967), has an authority to which a district judge must give particular weight. The now Chief Justice of the United States, (then Circuit Judge Burger), Circuit Judge Coffin of the Court of Appeals of this First Circuit, and Circuit Judge Miller, affirmed a dismissal of a suit for a declaratory judgment and injunctive relief brought by an Army private to enjoin the Secretary of Defense and others from sending him to Vietnam. The private had claimed that American military action in Vietnam was unconstitutional and illegal and the Secretary of Defense had no lawful authority to assign him there. In rejecting the claim, the court, through Miller C.J., said at pp. 665–666:

> "The District Court *sua sponte* ordered dismissal of the complaint on the ground that the relief sought represented a claim for judicial review of political questions beyond its jurisdiction and that it was an unconsented suit against the United States.

> "The District Court was, of course, eminently correct on both its primary and alternative grounds for dismissal; these propositions are so clear that no discussion or citation of authority is needed. The only purpose to be accomplished by saying this much on the subject is to make it clear to others comparably situated and similarly inclined that resort to the courts is futile, in addition to be wasteful of judicial time, for which there are urgent legitimate demands.
>
> "It is difficult to think of an area less suited for judicial action than that into which Appellant would have us intrude. The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive, *Johnson* v. *Eisentrager*, 339 U.S. 763, 789 . . ."

The citation relied upon in *Luftig* is the statement of Mr. Justice Jackson, made in an admittedly different context, that "Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region."

Perhaps in the case at bar *Luftig* is a somewhat unsatisfactory precedent because it holds that the use and disposition of military power "are plainly the exclusive province of Congress and the Executive" without considering whether the judicial department has or lacks the authority to determine which of the other two branches of the government does have that power.

It is at least possible that the courts do have the power to determine the relative scope of Congres-

sional and Presidential power to authorize the use abroad of our armed forces. See *Baker* v. *Carr,* 369 U.S. 186, 217, (1962); *Powell* v. *McCormack,* 395 U.S. 486, 516–522, (1969). But if the courts do have the power to determine the respective constitutional roles of the Congress and the President, then plaintiffs' complaint must be dismissed on the merits for reasons which have been as recently as April 20, 1971 set forth by the Court of Appeals for the Second Circuit in *Orlando* v. *Laird.* See same case *Berk* v. *Laird,* 429 F. 2d 302, (2nd Cir., 1970); *Berk* v. *Laird,* 317 F. Supp. 715, (E.D. N.Y., 1970); *Orlando* v. *Laird,* 317 F. Supp. 1013, (E.D. N.Y., 1970). The Second Circuit has held that (1) although a war of the dimensions of the Vietnam conflict may not be prosecuted solely on the basis of the President's authorization, because in such a war [not necessarily in all hostilities] "orders to fight must be issued in accordance with proper authorization from both [legislative and executive] branches" [*Berk* v. *Laird,* 429 F. 2d 302, 305, (2nd Cir., 1970)]; (2) authorization from Congress may take the form of an "inference of authorization from legislative action furnishing the manpower and materials of war for . . . military operations" without an explicit declaration of war [*Orlando* v. *Laird,* slip opinion, p. 2492]; and (3) legislation enacted by Congress in connection with the Vietnam war was sufficient to justify a judicial inference that Congress had in fact authorized the Vietnam war [*Orlando v. Laird,* slip opinion, pp. 2490–2492]. In reaching that third holding the court made a detailed examination of the relevant statutes and concluded that "There is, therefore, no lack of clear evidence to support a conclusion that there was an abundance of continuing mutual participation in the prosecution of the war. Both branches collabo-

rated in the endeavor and neither could long maintain such a war without the concurrence and cooperation of the other." [*Orlando* v. *Laird,* slip opinion, p. 2492]. Finally, at slip p. 2494, the Second Circuit said:

> "Beyond determining that there has been *some* mutual participation between the Congress and the President, which unquestionably exists here, with action by the Congress sufficient to authorize or ratify the military activity at issue, it is clear that the constitutional propriety of the means by which Congress has chosen to ratify and approve the protracted military operations in Southeast Asia is a political question. The form which congressional authorization should take is one of policy, committed to the discretion of the Congress and outside the power and competency of the judiciary, because there are no intelligible and objectively manageable standards by which to judge such actions."

This court is urged not to follow the *Orlando* decision chiefly on the theory that those who voted in Congress for military appropriations to pay for the Vietnam war did not thereby ratify and approve the President's action. But that theory was satisfactorily answered by Judge Judd in *Berk* v. *Laird,* 317 F. Supp. 715, 727–728, (E.D.N.Y., 1970) as well as by Judge Dooling in *Orlando* v. *Laird;* 317 F. Supp. 1013, 1019, (E.D.N.Y., 1970), and by Judge Anderson in the Court of Appeals. It is not profitable for another judge to go over the same ground again.

This court is also urged to give relief on the analogy of the Steel Seizure Case, *Youngstown Sheet & Tube Co.*, v. *Sawyer*, 343 U.S. 579, (1952). But that case involved Presidential action which was not authorized by Congress, whereas the action taken by the President in Vietnam was repeatedly authorized by Congress.

This court finds no ground not to follow the precedents cited, especially since on not entirely different grounds this court has heretofore reached substantially the same result. *United States* v. *Sisson*, 294 F. Supp. 511, 514–515, (D. Mass., 1968). It is a misconception to suppose that the authorities cited leave citizens subject to an unrestrained Presidential power to wage war. On the contrary, at least the more recent cases expressly state, and the earlier cases do not deny, that Congress has the power to determine whether our armed forces should be used in Vietnam. Moreover, the cases recognized that Congress has the means to make its power effective.

Complaint dismissed.

CHARLES E. WYZANSKI, Jr.

U.S. GOVERNMENT PRINTING OFFICE: 1971

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-97

SEP 14

SALVATORE ORLANDO,

Petitioner,

—v.—

MELVIN LAIRD, individually and as Secretary of Defense of the United States: and STANLEY R. RESOR, individually and as Secretary of the Army of the United States,

Respondents.

DOUGLAS KAPLAN,

Petitioner,

—v.—

MELVIN LAIRD, individually, and as Secretary of Defense of the United States, STANLEY R. RESOR, individually, and as Secretary of the Army of the United States, and MAJOR GENERAL WALTER M. HIGGINS, Commanding General, Fort Hamilton, Brooklyn, New York, Commanding Officer, Overseas Replacement Station, Fort Dix, New Jersey.

Respondents.

PETITIONERS' REPLY MEMORANDUM FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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The government's short memorandum in opposition does not meet any of the issues presented in the petition for certiorari. Furthermore, the government's position stands in direct contradiction to this Court's established constitutional role as final arbiter of authority between the executive and legislative branches.

1. The government claims in its opposing memorandum that this Court should not examine the issues of the Vietnam war because the "President should not be hemmed in by the prospect of judicial supervision in the exercise of these powers. . . . A President violates the constitutional powers of Congress . . . at his peril—and Congress is the best judge of whether there has been a violation. This is an issue which should be resolved by the Congress and the Executive, and not by the judiciary" (p. 6). What the government is saying is that the judiciary can never examine into the Executive's exercise of its powers, particularly its war powers, if the question at issue is whether the President has encroached upon Congressional prerogatives granted by the Constitution. For in that situation Congress is "the best judge of whether there has been a violation" of its Constitutional powers. Therefore only Congress can ever question or restrict the Executive's exercise of its asserted constitutional powers if it invades Congress's domain.

2. The government's position would do away with one of the most important functions of the federal judiciary, indeed with the very purpose for which it was instituted.[1]

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[1] Any Executive usurpation of authority will have its most immediate impact upon the civil liberties of the citizens whom the federal courts were established to protect. It is not Congress's authority that the courts are asked to vindicate but the personal rights of the citizens—such as the two soldiers involved in the instant case. James Madison stated when he introduced the Bill of Rights into Congress: "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights [in the Bill of Rights]; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment of rights expressly stipulated for in the Constitution by the declaration of rights." 1 *Annals of Congress*, 1st Cong., 1st Sess. 439.

From the earliest period of our history, the federal courts have questioned the assertion of the President's war powers to determine whether it comported with the constitutional grant and whether the President was invading the war powers granted to Congress. In *Little* v. *Barreme*, 2 Cranch 170 (1804) this Court held that the President had exceeded the war powers granted to him by Congress in authorizing certain seizures on the high seas and the captain of an American vessel acting under Presidential orders had to answer in damages. In *Ex parte Milligan*, 4 Wall. 2 (1866), this Court rejected the Executive's attempt to establish military courts to try civilians when the civil courts were open and operating. In *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946) this Court held that Congress had not granted the President power to establish military courts to try civilians in Hawaii and the President had no inherent authority to do so. In *Ex parte Endo*, 323 U.S. 283 (1944), this Court held that Congress had not authorized the President to keep admittedly loyal Japanese-Americans in detention camps and that the President could not establish such camps without the authorization of Congress. In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952) this Court held that the President's war powers did not extend to permitting him to seize the steel mills of the nation without Congressional authorization. And in *Greene* v. *McElroy*, 360 U.S. 474 (1959) this Court held that the President could not establish a national security program for defense plants without Congressional approval of the procedures.[2]

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[2] In *New York Times Co.* v. *United States*, 39 LW 4879 (June 30, 1971) five members of this Court considered the absence of specific Congressional legislation authorizing injunctive relief as

3. The question in every one of these cases was precisely the same as that before this Court in the instant matter, namely what is the extent of the President's war powers under the Constitution and what can the President do with or without explicit Congressional authorization. But no claim was made in these cases that since the President was allegedly encroaching upon Congress's war powers, only Congress could decide the issues in dispute. And this Court never refused to examine the Constitutional questions at stake on that basis.

4. In numerous analogous situations this Court has inquired into the extent of the Executive's powers under the Constitution to see whether Congressional authorization was required before it could take certain steps later challenged by a citizen. The power of a President to enter into foreign agreements outside of the Senate's treaty power was examined in *United States* v. *Belmont*, 301 U.S. 324 (1937) and *Tucker* v. *Alexandroff*, 183 U.S. 424 (1902).

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a significant factor in denying an injunction against publication of the so-called Pentagon papers. "It would, however, be utterly inconsistent with the concept of separation of power for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit. . . . The Constitution provides that Congress shall make laws, the President execute laws, and courts interpret law. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). It did not provide for government by injunction in which the courts and the Executive can 'make law' without regard to the action of Congress." (Marshall, *J.*, concurring) 39 LW at 4888. See also *Durand* v. *Hollins*, 3 Fed. Cas. 111 (No. 4186) (C.C.S.D.N.Y. 1860) where a justice of this Court sitting on circuit held that the President had the right to send naval ships to protect American citizens abroad without Congressional authorization. In the *Prize Cases*, 2 Black 635 (1863), this Court upheld President Lincoln's blockade of Southern ports during the Civil War before Congress had the opportunity to authorize his moves.

The President's right to discharge governmental officials without Congressional approval was examined in *Myers* v. *United States*, 272 U.S. 52 (1926) and *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). The President's power to seize lands without the approval of Congress was challenged in *United States* v. *Lee*, 106 U.S. 196 (1882). The power of the President to withdraw public lands from sale without the authorization of Congress was examined in *United States* v. *Midwest Oil Co.*, 236 U.S. 459 (1915). The President's power to obtain an injunction to protect the mail without an authorizing act by Congress was the issue in *In re Debs*, 158 U.S. 564 (1895).[3]

5. The issue in the above cases was also the one presented here: had the President encroached upon Congress's power under the Constitution and could he act as he did without Congressional sanction. It is the function of this Court not only to decide on the allocation of constitutional power between the government and the people and between the national and state governments, but also between the President and Congress. Almost every assertion of Presidential power will involve an infringement on the rights of Congress under the Constitution. For the government to say that in such cases only Congress can decide the question is to deny this Court's role as umpire of the constitutional separation of powers which has been firmly established in our history.

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[3] In related cases the power of Congress to order disbursements by Executive officials was decided in *Kendall* v. *United States*, 12 Pet. 524 (1838). The power of Congress to delegate legislative authority to the President in the economic sphere was examined in *Schechter Corp.* v. *United States*, 295 U.S. 495 (1935).

6. The Second Circuit and both district courts below rejected this contention of the government and held that the courts must examine the legal issues of the war and the allocation of the war powers between Congress and the Executive. The Second Circuit said:

> "We held in the first *Berk* opinion [*Berk* v. *Laird*, 429 F.2d 302 (2nd Cir. 1970)] that the constitutional delegation of the war-declaring power to the Congress contains a discoverable and manageable standard imposing on the Congress a duty of mutual participation in the prosecution of war. Judicial scrutiny of that duty, therefore, is not foreclosed by the political question doctrine." *Orlando* v. *Laird*, 443 F.2d 1039, 1042 (2nd Cir. 1971).

In the district court Judge Dooling said:

> ". . . determining whether or not a political decision has been taken by the appropriate set of governmental acts inescapably presents a purely judicial question when the existence or non-existence of a valid political authorization as the source of a particular command is drawn in question by one directly affected by it in his individual liberty as a citizen. . . . [If a court decides against the government], the only consequence can be resumption of conformity to constitutional norms of political conduct to achieve, dilute, deflect or reverse the desired political objectives." 317 F. Supp. at 1016.

The government now asks this Court to deny certiorari on a ground explicitly rejected by the court whose judgment is challenged.

7. The key issue on this appeal is one which this Court has never examined but which lies at the heart of the Constitutional allocation of the war power: How does this nation go to war? Can the President move the nation from a state of peace into a state of war on his own authority or is an explicit legislative act authorizing war necessary? What is Congress' role in the decision to go to war in this modern age? Is the burden in Congress on those who wish to start a war or on those who wish to stop it? It is no exaggeration to say that the security of the nation in the coming decades depends on the answer to these questions and that the legitimacy of any military action by the government will be called into question by the citizenry unless and until these questions are authoritatively answered.

For the reasons set forth above the petition for certiorari should be granted.

Respectfully submitted,

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BERNARD FROMARTZ

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

DOMINIC ABBATIELLO , being duly sworn, deposes

and says. that on the 15th day of SEPT. 19 71, at 2 o'clock

P. M. he served the annexed PETITIONERS' REPLY MEMORANDUM FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT NO. 71-97

upon Hon. Erwin N. Griswold, Solicitor General of the United States

Esq(x)., Attorney(x)

for RESPONDENTS

by depositing 3 true copies

thereof in a Post Office Box regularly maintained by the Government of the United States and under the care of the Postmaster of the City of New York at Village Station. New York, N. Y. 10014, enclosed in a securely closed wrapper with the postage thereon prepaid, addressed to said attorney(x) at (his/~~their~~) office

DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

that being the address designated in the last papers served herein by the said attorney.

MICHAEL H.
Notary Public, State of New York
No. 41-0126718
Qualified in Queens County
Commission Expires March 30, 1972

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-97

Salvatore Orlando and Douglas Kaplan,
Petitioners

vs.

Melvin Laird, et al.,
Respondents

AMICUS CURIAE MEMORANDUM ON PETITION FOR CERTIORARI

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September 1971

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-97

Salvatore Orlando and Douglas Kaplan,
Petitioners

vs.

Melvin Laird, et al.,
Respondents

AMICUS CURIAE MEMORANDUM
ON PETITION FOR CERTIORARI

Interest of Amici

Amici are United States Congressmen, state legislators, state attorneys general, and a governor who are extremely concerned about the effect of the Vietnam war upon American society.* As elected

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*The parties have consented to the filing of this MEMORANDUM. Pursuant to Rule 39(4) of the Court's rules, the MEMORANDUM has been produced by xerography. Rule 39(4) explicitly says that "Printing, as the term is used in these rules, shall include any process capable of producing a clear black image on white paper but shall not include ordinary carbon copies." (Emphasis added.) Xerography falls four square within the wording of the rule because it is a process capable of producing a clear black image on white paper. More-

officials of the people they have an interest in insuring that the allocation of power established by the Constitution, which they are sworn to uphold, is followed by the Executive branch of the federal government in the area of war and peace. Amici are also interested in insuring that great constitutional questions which divide and agitate their constituencies are settled by the proper organs of government. Amici feel that the question of the legality of the Vietnam war is one of the most troublesome and disturbing issues of our times, and has greatly troubled the people they represent. Therefore, Amici support efforts to have the courts settle the matter of whether the war is legal or illegal.

Reasons For Granting The Writ

The Vietnam war has divided and agitated America more than any question of the last thirty years. This has happened not only because many citizens question the wisdom of our military moves in Southeast Asia, but because millions of Americans doubt whether the proper constitutional forms have been followed in the initiation and escalation of American military involvement in Vietnam. This has had the effect of making many of our citizens question the legitimacy of our efforts in Vietnam. Not only is this war in doubt, but future military efforts of our government may be called into question unless the limits and powers of the government to wage war are definitively settled

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over, xerography is convenient, speedy, and helpful to parties who have a vital stake in the upholding of constitutional principles but lack the deep pocket necessary for commercial printing.

by the courts who have the final responsibility of defining the allocation of power under the Constitution. Without intimating any view on how we feel this Court should rule on the question, Amici urge this Court to accept certiorari in this action so that these profound constitutional questions may be settled.

Respectfully submitted,

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659-6000

Attorney for Amici

The following public officials are the Amici who join in this AMICUS MEMORANDUM:

PARREN J. MITCHELL,
Member of Congress

MICHAEL HARRINGTON,
Member of Congress

DON EDWARDS,
Member of Congress

HERMAN BADILLO,
Member of Congress

LES ASPIN,
Member of Congress

JOSEPH E. KARTH,
Member of Congress

WALTER FAUNTROY,
Member of Congress

DONALD RIEGLE,
Member of Congress

THOMAS REES,
Member of Congress

ROBERT LEGGETT,
Member of Congress

JAMES H. SCHEUER,
Member of Congress

PHILIP BURTON,
Member of Congress

PATRICK LUCEY,
Governor of Wisconsin

ROBERT QUINN,
Attorney General of Massachusetts

DAVID NORVELL, who joins the MEMORANDUM in his capacity as a private citizen rather than in his capacity as Attorney General of New Mexico

ED HARRIS,
State legislator, Texas.

ROBERT D. WATT,
State legislator, Montana

ROBERT K. HOLLIDAY,
State legislator, West Virginia

MICHAEL O'CONNOR,
State legislator, South Dakota

ALAN SIEROTY,
State legislator, California

JOHN VASCONCELLOS,
State legislator, California

JOHN MILLER,
State legislator, California

YVONNE BRAITHWAITE,
State legislator, California

JOHN BURTON,
State legislator, California

JOHN DUNLAP,
State legislator, California

CHARLES WARREN,
State legislator, California

KEN MEADE,
State legislator, California

HENRY WAXMAN,
State legislator, California

GOERGE ZENOVICH,
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ANTHONY BEILENSON,
State legislator, California

HOWARD KLEBANOFF,
State legislator, Connecticut

AARON JAFFE,
State legislator, Illinois

CHARLES DOCTER,
State legislator, Maryland

C. LAURENCE WISER,
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DAVID LIEDERMAN,
State legislator, Massachusetts

JOHN BUSINGER,
State legislator, Massachusetts

WILLIAM SPENCE,
State legislator, Massachusetts

THOMAS MAHONEY,
State legislator, Massachusetts

PETER McCARTHY,
State legislator, Massachusetts

BEN BROWN,
State legislator, Georgia

WILLIAM X. WALL,
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PETER MASNIK,
State legislator, Massachusetts

CHESTER ATKINS,
State legislator, Massachusetts

DOROTHY BRADLEY,
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WILLIAM NORMAN,
State legislator, Montana

JOHN STAIGMILLER,
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NANCIE FADELEY,
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EDWARD MAGGIONONE,
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DUAINE SWENSON,
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MIDGE MILLER,
State legislator, Wisconsin

DENNIS CONTA,
State legislator, Wisconsin

ANTHONY EARL,
State legislator, Wisconsin

ED JACKAMONIS,
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HERBERT GROVER,
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HARVEY DUEHOLM,
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JOSEPH CZERWINSKI,
State legislator, Wisconsin

EDWARD NAGER,
State legislator, Wisconsin

FREDERICK KESSLER,
State legislator, Wisconsin

LLOYD BARBEE,
State legislator, Wisconsin

ROBERT NELSON,
State legislator, West Virginia

The following scientists are not public officials, but join in the sentiments expressed in the MEMORANDUM:

GEORGE WALD

S.E. LURIA

OWEN CHAMBERLAIN

JAMES D. BJORKEN

RICHARD BLANKENBECLER

LINUS PAULING

ROBERT HOFSTADTER

PIERRE NOYES

JOSHUA LEDERBERG

...RARY
...URT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71 - 97

SALVATORE ORLANDO AND DOUGLAS KAPLAN,

PETITIONERS

V.

MELVIN LAIRD, ET AL.,

RESPONDENTS

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF SENATOR MIKE GRAVEL

AMICUS CURIAE BRIEF OF SENATOR MIKE GRAVEL ON PETITION FOR CERTIORARI

MOTION

Amicus hereby moves for leave to file the attached amicus curiae brief in the abovecaptioned case. The interest of amicus in the present case is fully set out in the first portion of the amicus brief, which portion is fully incorporated herein by reference. In brief, amicus has an interest

as a Senator in insuring that the Constitution of the United States is upheld, that separation of powers is respected and that the power of Congress is maintained under the Constitution. Amicus thus has a vital interest in the present case because it raises critical constitutional issues as to whether the power of Congress has been arrogated by the Executive and whether the Constitution has been violated in a way that nullifies separation of powers.

Additionally, as a Senator, amicus has an interest and a perspective not shared or put forth by plaintiffs or defendants on the legislator's need for a decision in this case in order that Congress may know the extent of its constitutional powers vis a vis the President in regard to the decision to commit this nation to war and keep it in war.

Respectfully submitted,

Herbert O. Reid, Sr.
Counsel for amicus

INTEREST OF AMICUS

Amicus, Mike Gravel, is a United States Senator from the State of Alaska. As a Senator, amicus has an interest in insuring that the United States Constitution, which he is sworn to uphold, is followed in the area of war and peace. Amicus also has an interest as a Senator in insuring that the power of Congress is maintained under the Constitution; and in insuring that the concept of separation of powers, which grants certain powers to Congress and others to the Executive, receives the respect it deserves.

The United States Constitution provides that Congress shall have the power to declare war. Article I, Section 8, Clause 11. Though there has been no declaration of war in Indo-China, the nation has been and is fighting a major war in that part of the world. The price of the war has been enormous. More than 50,000 American men have been killed.

Over 300,000 Americans have been wounded. The nation has spent over 150 billion dollars on the war. The war has contributed significantly to our soaring inflation. It has diverted funds which would otherwise have been spent to rejuvenate cities and to raise the standard of living of millions of poorer citizens. It has led to a vast generation gap and to millions of citizens distrusting their government. The litany of the social and economic dislocations it has caused is gruesomely long.

Because the Constitution does give Congress the power to declare war, serious questions have long been raised and are being raised in this case as to whether the President, without explicit Congressional authorization, has the constitutional authority to wage a war of the size of the Indo-China war and with the enormous consequences of that war. Amicus has a vital concern with such questions because of his interest as a Senator in having

the Constitution followed and the power of Congress respected. Therefore, amicus urges the Court to hear and decide the questions at issue here.

REASONS FOR GRANTING THE WRIT

The legality of major wars which have not been explicitly authorized by Congress may well be the most critical constitutional issue facing this country. War is the most awesome act which the nation can undertake. Its consequences to life, liberties and property are enormous, as the war in Indo-China has made only too evident. It is clear that the nation should not be committed to such a far-reaching course of events unless the branch making the commitment and waging the war has the constitutional power to do so.

In regard to the Indo-China war, there has long been a strong body of criticism which holds that the Executive, the branch of government which has committed us to the war and

waged the war, does not have the constitutional authority to do what it has done. This criticism, which has come from many segments of society including federal legislators, has cast further doubt upon the legitimacy of our efforts in Indo-China and will cast doubt on the validity of any future military efforts. There is thus a deep need for a final and authoritative decision on the question of whether the Executive has the constitutional power to wage a major war without explicit Congressional authorization.

For a final and authoritative resolution of whether a particular branch of government possesses given powers under the Constitution, this nation, and the nonjudicial branches of government, look to the courts and ultimately to the Supreme Court. Ever since Marbury v. Madison, 1 Cranch 137 (1803), it has been the Supreme Court's bound duty to rule on whether branches of government are acting within their powers or outside of them. In Marbury,

where the Court ruled on whether Congress had the constitutional power to grant the Supreme Court original jurisdiction in the case at bar, the Court said, 1 Cranch at 177 - 178:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> *So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law; disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. . .

Marbury's doctrine that it "is of the very essence of judicial duty" for courts to apply the constitution has been followed from 1803 to the present day in cases where the question was whether a branch of government had the constitutional power to take given actions. In the Prize Cases, 2 Black 635

(1863), this Court ruled on whether or not the President had the constitutional authority to institute a blockade during the Civil War. In Ex Parte Milligan, 4 Wall 2 (1866), the Court ruled on whether the Executive could try civilians by court martial during the Civil War. In Korematsu v. United States, 323 U.S. 214 (1944), the Supreme Court ruled on whether Congress and the President had the constitutional power to provide for the exclusion of Japanese-Americans from the west coast. In Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952), the Supreme Court passed on whether the President had the constitutional authority to seize the steel mills during the Korean war. In Powell v. McCormick, 395 U.S. 486 (1969), the Court passed on whether the Congress has the constitutional power to refuse to seat a Representative on grounds other than the Constitution's three requirements of age, citizenship and residency.

In the present case, this Court is being asked to perform the same bound judicial duty of applying the Constitution which it has performed ever since Marbury v. Madison. It is true that events of great magnitude, with possible effects on foreign relations, could be affected by a constitutional decision here. But the fact that events of consequence are involved is no constitutional warrant for the Court refusing to perform its judicial duty. This Court has performed its duty in many cases involving great events, events which at times had tremendous potential effects on foreign relations. The cases cited above, which involved questions of the constitutional power of Congress and the President, provide examples of this. Marbury v. Madison itself was heavily involved with the desperate struggle for power between two parties, the Jeffersonian Republicans and the Federalists, which had diametrically opposed ideas on how the country should be governed and what its

foreign policy should be. To rule on the legality of President Lindoln's blocade during the Civil War was obviously to pass legal judgment on events having the most enormous significance in relation to war and foreign relations. The ruling in Ex Parte Milligan was on a program that was claimed to be highly conducive if not absolutely necessary to the success of the union armies. Korematsu involved a geographical exclusion and internment program which was similarly claimed to be vitally necessary to our success in World War II. In Youngstown the government's position was that the President's seizure of the mills was essential to the successful continuation of the American war effort.

There have also been many other cases, involving events of great magnitude, in which the Court has performed its judicial duty. In McCulloch v. Maryland, 17 U.S. 316 (1819), the Court adjudicated the legality of the Bank of the United States, an institution

whose existence was the source of a furious and continuous public battle and had a critical impact on the economy. The first income tax, a subject of bitter public division, was adjucated in Pollock v. Farmer's Loan & Trust Co., 197 U.S. 429 (1895). Although the problem of race has been the most bitter and intractable question in American history, this Court dealt with racial segregation in Brown v. Board of Education, 347 U.S. 483 (1952). In Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964); and other apportionment cases, the Court adjucated legal issues which involved the basic distribution of political power in the United States.

Thus, amicus reiterates that this Court's duty to interpret and apply the Constitution cannot be shirked because important events are involved. Nor can the Court's duty be avoided because the case comes to the Court on certiorari rather than on appeal as of right. One of the critical reasons for the

certiorari power is to enable the Court to select cases presenting questions of national importance for a full hearing, and this consideration is specifically recognized in the Court's own rules. Rule 19 (1)(b). The present case involves questions of paramount national importance. Moreover, in the last decades, many of the Court's most significant rulings have been delivered in cases which came up via certiorari. E.g., Youngstown Sheet & Tube v. Sawyer, supra; Bolling v. Sharpe, 347 U.S. 497 (1954); New York Times Co. v. United States, 29 L. Ed. 2d 822 (1971).

In conclusion, then, amicus believes that, in accordance with its constitutional role as layed out in Marbury v. Madison and continued to the present day, this Court has a duty to resolve the paramount constitutional issues presented here. Amicus therefore urges the Court to grant certiorari and decide the case so that the legislature and the nation may

know with finality whether the Executive has the legal power to fight a major war that has not been explicitly authorized by Congress.

Respectfully submitted,

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